No. 87-5259-CFH
Status: GRANTED

Title: Frank Dean Teague, Petitioner
v.
Michael Lane, Director, Illinois Department of Corrections, et al.

Docketed:
August 10, 1987

Court: United States Court of Appeals for the Seventh Circuit

See also:
86-7126
87-5816
87-5884
87-6031
87-6154

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Counsel for respondent: Bindi,David E.

Entry	Date	Note	Proceedings and Orders
1	Aug 10 1987	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Sep 1 1987		Brief of respondent Lane, Dir., IL DOC in opposition filed.
4	Sep 3 1987		DISTRIBUTED. September 28, 1987
5	Sep 11 1987	X	Reply brief of petitioner Frank D. Teague filed.
7	Feb 22 1988		REDISTRIBUTED. February 26, 1988
9	Feb 29 1988		REDISTRIBUTED. March 4, 1988
11	Mar 7 1988		Petition GRANTED.
			**********
13	Mar 31 1988		Order extending time to file brief of petitioner on the merits until May 12, 1988.
14	Apr 26 1988		Joint appendix filed.
16	May 12 1988		Brief amicus curiae of Lawyers' Committee for Civil Rights Under Law filed.
17	May 12 1988		Brief amici curiae of NAACP Legal Defense and Edcu. Fund, et al. filed.
19	May 12 1988		Brief of petitioner Frank D. Teague filed.
18	May 13 1988		Record filed.
		*	Certified copy of original record received.
15	May 16 1988		Record filed.
		*	Certified copy of original record, 6 volumes, received.
21	Jun 3 1988		Order extending time to file brief of respondent on the merits until July 2, 1988.
22	Jul 1 1988		Brief amicus curiae of Criminal Justice Legal Foundation filed.
23	Jul 1 1988		Brief of respondent Lane, Dir., IL DOC filed.
24	Jul 6 1988		CIRCULATED.
25	Jul 15 1988		Set for argument. Tuesday, October 4, 1988. (4th case) (1 hr.)
27	Jul 29 1988	X	Reply brief of petitioner Frank D. Teague filed.
28	Oct 4 1988		ARGUED.

EDITOR'S NOTE

THE FOLLOWING PAGES WERE POOR HARD COPY AT THE TIME OF FILMING. IF AND WHEN A BETTER COPY CAN BE OBTAINED, A NEW FICHE WILL BE ISSUED.

87-5259

No.

IN THE

SUPREME COURT OF UNITED STATES

October Term, 1986

FRANK DEAN TEAGUE,

Petitioner,

v.

MICHAEL LANE, Director, Department of Corrections, and MICHAEL O'LEARY, Warden, Stateville Correctional Center,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED FOR REVIEW

Whether the Sixth Amendment fair cross-section requirement prohibits the prosecution's racially discriminatory use of the peremptory challenge.

Whether Batson should be applied retroactively to all convictions not final at the time certiorari was denied in McCray v. New York in order to correct the inequity and confusion resulting from the intentional postponement of the re-examination of Swain.

Whether a defendant overcomes the presumption of correctness of the prosecution's proper use of its peremptory challenges, as recognized by Swain v. Alabama, where examination of the prosecutor's volunteered reasons for its exercise of its challenges to exclude black jurors demonstrates that the prosecution has engaged in racial discrimination.

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FRANK DEAN TEAGUE,

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MICHAEL LANE, Director, Department of Corrections, and MICHAEL O'LEARY, Warden, Stateville Correctional Center,

Respondents.

INTRODUCTION

TO THE CHIEF JUSTICE AND ASSOCIATE JUSTICES OF THE SUPREME COURT OF THE UNITED STATES:

May it Please the Court:

Petitioner, Frank Dean Teague, respectfully prays that this Court issue a writ of certiorari to review the en banc decision of the United States Court of Appeals for the Seventh Circuit.

OPINIONS BELOW

The original panel opinion reversed the district court's denial of habeas corpus relief. That panel decision is unreported but is attached to this Petition as Appendix A. The panel opinion was vacated and the cause was set for rehearing en banc pursuant to Circuit Court Rule 16(e). That order is reported at 779 F.2d 1332 (7th Cir. 1985) and is attached as Appendix B. On May 11, 1987, the en banc Court of Appeals affirmed the decision of the district court denying habeas corpus relief, Cudahy and Cummings, JJ., dissenting. That opinion is reported at 820 F.2d 832 (7th Cir. 1987) and is attached as Appendix C. The district court order granting summary judgment in favor of Respondents is unreported and attached as Appendix D.

STATEMENT OF JURISDICTION

The jurisdiction of this Court is invoked pursuant to 28

U.S.C. 1254(1). This Petition is being filed within 90 days of the decision of the Court of Appeals, which issued on May 11, 1987.

CONSTITUTIONAL PROVISIONS INVOLVED

AMENDMENT VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense.

AMENDMENT XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of laws.

STATEMENT OF THE CASE

Frank Teague, a black man, was convicted of the offense of armed robbery of an A & P supermarket and attempt murder of police officers who were shot at following the robbery. His defense was insanity which he contended was caused in part by his wrongful incarceration in a federal penitentiary for almost eight years. The jurors who were selected and sworn to decide the issue of his guilt or innocence were white, the prosecution having elected to exercise all ten of the peremptory challenges afforded it by statute, Ill.Rev.Stat., Ch. 38, Sec. 115-4(e), to excuse prospective jurors who were black. Defense counsel also excused a prospective black juror because she was married to a

police officer and his client was charged with attempt murder of police officers. (R. 97)

When objection was made during jury selection to the prosecution's use of its peremptory challenges to exclude blacks from the jury, the prosecutor represented that he was attempting to achieve a balance of men and women and age groups, noting also defense counsel's use of a single peremptory to excuse a prospective black juror and that the prosecution had also excused a white juror who was a prospective alternate. (R. 97, 98, 177, 178) The trial judge made no finding with respect to the validity of the State's reasons for exercise of its challenges, but the record refutes the contention that blacks were eliminated from the jury in an effort to achieve sexual and age balance. See Appendix A, panel opinion, pp. 24-27.

Although not disputing that the prosecution had utilized its peremptory challenges solely for the purpose of excluding a racial group from the jury, the Illinois Appellate Court concluded that Teague was not entitled to any relief from his conviction because he had made no showing of systematic exclusion of the group as required by Swain v. Alabama, 380 U.S. 202 (1965). The Court declined to follow People v. Wheeler, 22 Cal. 3d 258, 584 P.2d 748 (1978) on the basis that the remedy it proposed was vague and uncertain and would alter the nature of the peremptory challenge. The Court concluded that abolition of the peremptory challenge by the legislature would be the appropriate means to end the prosecution's practice of using its challenges to exclude a racial group. People v. Teague, 108 Ill.App.3d 891, 439 N.E.2d 1066 (1st Dist. 1982)(Campbell, J. dissenting). The Illinois Appellate Court denied a Petition for Rehearing and the Illinois Supreme Court denied leave to appeal. People v. Teague, 449 N.E.2d 820 (Ill. 1983)(Simon,J. dissenting). This Court denied a Petition for Writ of Certiorari. Teague v. Illinois, 464 U.S. 867 (1983)(Marshall and Brennan, JJ., dissenting).

On March 5, 1984, Petitioner filed a Petition for Writ of Habeas Corpus in the United States District Court for the Northern District of Illinois, complaining that his Sixth and Fourteenth Amendment rights were violated when the prosecution

utilized its peremptory challenges to exclude black jurors. In his Brief submitted in support of the Petition, Teague asked the district court to accept the invitation of this Court in McCray v. New York, 461 U.S. 961 (1983) to re-examine the issue of whether the Constitution prohibits the use of peremptory challenges to exclude a racial group from the jury and to conclude that an accused is denied his right to a jury drawn from a fair cross section of the community when the prosecutor employs peremptory challenges to exclude jurors on the basis of race. (Petitioner's Brief, p. 16) Petitioner also cited in support of his argument McCray v. Abrams, 576 F.Supp. 1244 (E.D.N.Y.1983), which held that the Equal Protection Clause, either alone or in in conjunction with the Sixth Amendment, prohibits the racially discriminatory use of the peremptory challenge. (Petitioner's Brief. p. 15) Respondents moved for summary judgment, contending Swain v. Alabama, 380 U.S. 202 (1965) controlled. (Memorandum in Support of Respondents' Motion for Summary Judgment) Petitioner cross-moved for summary judgment and cited in support thereof Weathersby v. Morris, 708 F.2d 1493 (9th Cir. 1983), wherein the Court held that if a prosecutor volunteers explanations for his challenges, those explanations may be reviewed to determine whether there has been a perversion of the peremptory challenge contrary to Swain. (Memorandum In Support of Cross-Motion, p. 6) The district court on August 8, 1984 granted summary judgment in favor of Respondents, concluding that although it found Petitioner's arguments persuasive and might be inclined to adopt his reasoning if the court were writing on a clean slate, the issue was foreclosed by Swain and Seventh Circuit decisions declining to depart from Swain. (Order p. 2)

In the Court of Appeals, Petitioner again urged that Swain be re-examined and a procedure such as that outlined by the Courts in McCray v. Abrams or Weathersby v. Morris be adopted whereby an accused could complain of the prosecutor's racially discriminatory use of peremptory challenges in a single case. (Appellant's Brief, pp. 15, 25) A divided panel concluded that the Sixth Amendment does bar the racially discriminatory use of peremptory challenges so as to deprive an accused of the fair

possibility of obtaining a representative jury, but that opinion was vacated and the case set for rehearing en banc pursuant to Circuit Rule 16(e). U.S. ex rel. Teague v. Lane, 779 F.2d 1332 (7th Cir.1985).

Following the decision of this Court in Batson v. Kentucky, 106 S.Ct. 1712 (1986), the parties were directed by the Court of Appeals to file additional memoranda discussing the impact of Batson on this case. Petitioner argued that his Sixth Amendment claim remined viable (Memorandum of Appellant, pp. 3-7) and that even if it would be determined that Batson would not be given full retroactive effect, Batson should apply to all cases, including Petitioner's, not yet final at the time certiorari was denied in McCray v. New York, 461 U.S. 961 (1983). (Memorandum of Appellant, pp. 14-18) In response to Respondents' argument, made for the first time in its post-Batson memorandum, that Petitioner had waived any equal protection claim by a procedural default in the state court (Memorandum of Respondents, pp. 2-6), Petitioner argued there had been no procedural default, whether or not the equal protection claim had been raised in state court, because that claim had been rejected on its merits by the state court, which had denied Petitioner relief on the grounds that Swain controlled. Petitioner cited Ulster County Court v. Allen, 442 U.S. 140 (1979), United States ex rel. Ross v. Franzen, 688 F.2d 1181 (7th Cir. 1982) and Thomas v. Blackburn, 623 F.2d 383 (5th Cir. 1980) as support for this argument. (Responsive Memorandum, pp. 3-4) Following en banc reargument, the Court of Appeals determined that Allen v. Hardy, 106 S.Ct. 2878 (1986) foreclosed retroactive application of Batson to Petitioner, Teague v. Lane, 820 F.2d 832, 834 and n.4 (1987), that Petitioner had not made a showing of an equal protection violation pursuant to Swain, even assuming that claim was not procedurally barred by Wainwright v. Sykes, 433 U.S. 72 (1977), 829 F.2d at 834 n.6, and that the Sixth Amendment fair cross-section requirement was inapplicable to the petit jury.

REASONS FOR ALLOWANCE OF WRIT

WHETHER THE SIXTH AMENDMENT FAIR CROSS-SECTION REQUIREMENT

EXTENDS TO THE PETIT JURY SO AS TO BAR THE RACIALLY DISCRIMINATORY USE OF THE PEREMPTORY CHALLENGE IS A RECURRING QUESTION ON WHICH THIS COURT EXPRESSED NO VIEW IN BATSON BUT WHICH REMAINS CONTROVERSIAL, RESULTING IN CONFLICTING DECISIONS FROM BOTH STATE AND FEDERAL COURTS, THUS MERITING THIS COURT'S REVIEW.

Petitioner was tried by an all white jury as a consequence of the prosecution's use of all ten of its peremptory challenges to exclude black jurors. Petitioner contends the prosecution's racially discriminatory use of its challenges violated his Sixth Amendment right to be tried by a jury drawn from a fair cross section of the community. Petitioner does not complain that the jury that was chosen in his case did not mirror the community or insist that he is entitled to a jury of any particular composition, but contends that the fair cross-section requirement prohibits the prosecution's use of peremptory challenges in a racially discriminatory manner to unreasonably restrict the possibility the jury is comprised of a fair cross section of the community. This issue was expressly left undecided by this Court in Batson v. Kentucky, 106 S.Ct. 1712, 1716 n.4 (1986), and considerable conflict exists among the circuit courts of appeals and other courts regarding whether the prosecution's racially discriminatory use of the peremptory challenge violates the Sixth Amendment. Therefore, it is appropriate that this Court grant certiorari.

Both the Second and Sixth Circuit Courts of Appeals have adopted the view that the Sixth Amendment fair cross-section requirement extends to the petit jury so as to bar the prosecution's use of the peremptory challenge on the basis of race. Roman v. Abrams, 41 CrL 2245 (2nd Cir. 6/9/87); Booker v. Jabe, 775 F.2d 762 (6th Cir. 1985), vacated, 106 S.Ct. 3289, aff'd on reconsideration, 801 F.2d 871 (1986), cert. denied, 107 S.Ct. 910. The split among the circuit courts of appeals and various state courts on this issue was noted in United States ex rel. Yates v. Hardiman, 656 F.Supp. 1006, 1012 (N.D.Ill. 1987), which court concluded that the fair cross-section requirement is violated where jurors are peremptorily challenged by the

prosecution because they are the same race as the defendant. See also Fields v. People, 732 P.2d 1145 (Colo. 1987)(claim of racially discriminary use of peremptory challenges subject to Sixth Amendment analysis).

The Seventh Circuit Court of Appeals rejected Petitioner's argument on the grounds that the fair cross-section requirement has no applicability to the petit jury, only to the venire from which the petit jury is drawn. Teague, 820 F.2d at 839. While Lockhart v. McCree, 106 S.Ct. 1758 (1986) has been interpreted as supporting that position, the question was left unresolved in Lockhart since this Court determined Witherspoon-excludables were not a distinctive group in the community for Sixth Amendment purposes. 106 S.Ct. at 1765. That this Court vacated and remanded McCray v. Abrams, 750 F.2d 1113 (2nd Cir. 1984) and Booker v. Jabe, 775 F.2d 762 (1985) in light of Allen v. Hardy, 106 S.Ct. 2878 (1986) and Batson v. Kentucky, 106 S.Ct 1712 (1986), and not in light of Lockhart, has also been held indicative of an absence of intent that Lockhart settles the Sixth Amendment issue. Yates, 656 F.Supp. at 1015.

Prior decisions of this Court provide a basis to conclude that the fair cross-section requirement extends beyond the jury venire. In Apodaca v. Oregon, 406 U.S. 404, 413 (1972), this Court expressed the view that the fair cross-section requirement forbids "systematic exclusion of identifiable segments of the community from jury panels and from the juries ultimately drawn from those panels." (Emphasis added) Louisiana's special exemption for women was held to violate the Sixth and Fourteenth Amendments in Taylor v. Louisiana, 419 U.S. 522, 538 (1975) not merely because women were thereby excluded from the jury pool but because it "operate[d] to exclude them from petit juries." Trial by jury of less than six person was held to violate the Sixth Amendment in Ballew v. Georgia, 435 U.S. 223, 237 (1978) because it deceases the opportunity for meaningful and appropriate representation of a cross section of the community on the petit jury, not on the panel or venire from which the jury is drawn.

Permitting the prosecution to exercise its peremptory challenges to excuse perspective jurors on the basis of race

alone similarly violates the fair cross-section requirement because it presents no less an obstacle to the possibility of minority representation on the jury. Selection of a jury drawn from a fair cross section of the community is not an end in itself, but contemplates the possibility that the petit jury will be similarly comprised. The fair cross-section requirement would be illusory if no restriction existed on the ability of the prosecution to interpose an obstacle to minority representation on the petit jury so long as minorities were not excluded from the venire.

The controversy over the continued vitality of the Sixth Amendment analysis to the peremptory challenge issue persists. A direct conflict exists among the circuit courts of appeals regarding whether the fair cross-section requirement can have any applicability to the petit jury. This Court declined to adopt any view on this issue in Batson but the continued divergence of opinions demands that this Court grant certiorari to finally resolve the dispute.

BATSON SHOULD BE APPLIED RETOACTIVELY TO ALL CONVICTIONS NOT FINAL AT THE TIME CERTIORARI WAS DENIED IN McCRAY v. NEW YORK IN ORDER TO CORRECT THE INEQUITY AND CONFUSION WHICH RESULTED WHEN THIS COURT, WHILE SIGNALING THAT SWAIN WAS NO LONGER DISPOSITIVE, INTENTIONALLY DELAYED A DECISION ON THE ISSUE RESOLVED BY BATSON.

In Griffith v. Kentucky, 107 S.Ct. 708 (1987), this Court extended the benefits of Batson v. Kentucky, 106 S.Ct. 1712 (1986) to all cases pending on direct review or not yet final at the time the decision in Batson was reached. In a concurring opinion, Justice Powell expressed his agreement with the views of Justice Harlan respecting rules of retroactivity as stated in Mackey v. United States, 401 U.S. 667, 675 (1971)(Harlan, J. concurring and dissenting) and Desist v. United States, 394 U.S. 244, 256 (1969)(Harlan, J. dissenting), and his hope that, when squarely presented with the question, the Harlan view that habeas petitions should generally be judged according to the constitutional standards existing at the time of the conviction, would be

adopted by the Court. Griffith, 107 S.Ct. at 716 (Powell, J., concurring). Petitioner submits that this case squarely presentes the issue of the retroactivity of decisions to habeas petitions and asks that a rule of retroactivity be adopted to extend the benefits of Batson to those habeas corpus petitioners, including Petitioner herein, whose cases were not yet final at the time this Court denied certiorari in McCray v. New York, 461 U.S. 961 (1983).

In Harlan's view, generally, the law prevailing at the time a conviction became final is to be applied in adjudicating habeas petitions. The justification for extending the scope of habeas to all alleged constitutional errors being to force trial and appellate courts in the federal and state system to toe the constitutional mark, it is unnecessary to apply new constitutional rules on habeas to serve that interest. Mackey, 401 U.S. at 688.

At the time Petitioner's conviction became final,[1] the state of the law respecting a prosecutor's discriminatory use of peremptory challenges was uncertain. When certiorari was denied in McCray v. New York, 461 U.S. 961 (1983), Justices Brennan and Marshall dissented, while Justices Stevens, Powell and Blackman joined in an opinion stating they recognized the importance of the issue presented, but believed further consideration of the problem by other courts would enable the Court to address the problem more wisely at a later date and asked that the various states serve as laboratories in which the issue would receive further study before it was finally addressed. This concurrence, coupled with the dissent, signaled that the state courts were no longer bound by Swain v. Alabama, 380 U.S. 202 (1965). At the same time the Court intentionally delayed resolution of the issue on the assumption that lower courts would accept the Court's invitation to re-examine the issue on its merits, an assumption which proved to be untrue in Illinois which continued to hold the issue foreclosed by Swain.

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[1]Certiorari was denied in McCray on May 31, 1983. Petitioner's conviction became final when certiorari was denied on October 3, 1983.

Just as Justice Harlan found it indefensible for the Court to "[fish] one case from the stream of appellate review, [use] it as a vehicle for pronouncing new constitutional standards, and then [permit] a stream of similar cases to flow by unaffected by that new rule," Mackey, 401 U.S. at 679 (Harlan, J., dissenting), it is indefensible to fish one case from the stream of appellate review, signal that a change is forthcoming, yet leave it entirely to the discretion of lower courts whether to follow precedent that was at that point questioned or discredited, though not expressly overruled. In intentionally delaying a decision, this Court increased the possibility that different constitutional protection would be meted out to defendants simultaneously subjected to identical constitutional deprivation, which is inconsistent with the goal of treating similarly situated defendants similarly. United States v. Johnson, 457 U.S. 537, 556 (1982). Moreover, since the opinion of Justice Stevens respecting the denial of certiorari in McCray made it difficult if not impossible for lower courts to discern what was the prevailing state of the law since they were cast in the role of laboratories where the law was open to experimentation, lower courts were unable to determine after McCray if they were "toeing the constitutional mark." Solem v.Stumes, 465 U.S. 638, 653 (1983). The failure of this Court to provide firm guidance to the lower courts from the time of denial of certiorari in McCray until Batson compels the conclusion that if Batson is to be given limited retroactive effect, it should be measured from the date of denial of certiorari in McCray and be held applicable to all cases then pending on direct review.[2] The inequity and confusion which resulted from the Supreme Court's intentional postponement of resolution of the issue of the vitality of Swain can only be corrected by extension of the benfits of Batson to all those thus affected.

[2] This holding would be consistent with this Court's resolution of Allen v. Hardy, 106 S.Ct. 2878 (1986) inasmuch as Allen's conviction was final when certiorari was denied in McCray.

THE DIRECT CONFLICT BETWEEN THE DECISIONS OF THE EIGHTH AND NINTH CIRCUIT COURTS OF APPEALS AND THE SEVENTH CIRCUIT COURT OF APPEALS REGARDING WHETHER AN EQUAL PROTECTION VIOLATION MAY BE PROVEN PURSUANT TO SWAIN v. ALABAMA OTHER THAN BY PROOF OF A SYSTEMATIC EXCLUSION OF BLACK JURORS BY PEREMPTORY CHALLENGE IN CASE AFTER CASE, A QUESTION LEFT OPEN BY SWAIN, SHOULD BE RESOLVED BY THIS COURT.

Even should this Court decline to hold Batson v. Kentucky, 106 S.Ct. 1712 (1986) has any retrospective application to his case, Petitioner contends that he is entitled to relief from his conviction because the record establishes an equal protection violation pursuant to Swain v. Alabama, 380 U.S. 202 (1965). In Swain, this Court reaffirmed that a "State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Proctection Clause." 380 U.S. at 204. However, after reviewing the purpose and function of the peremptory challenge system, it concluded that a presumption must exist in any particular case that the prosecution is using its challenges to obtain a fair and impartial jury to try the case before the court, and that this presumption would not be overcome by allegations that all the Negroes had been removed or that they were removed because they were Negroes. 380 U.S. at 222. The Court did agree that the presumption of proper use might be overcome if a prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or victim may be, is responsible for the removal of Negroes with the result that none ever serve on petit juries. 380 U.S. at 223, 224. Swain did not limit a defendant's demonstration of a perversion of the peremptory challenge amounting to an equal protection violation to proof of such circumstances, but merely acknowledged such proof would overcome the presumption of proper use. The question remains, therefore, as to what other circumstances might demonstrate purposeful discrimination by a prosecutor in his use of his challenges.

Petitioner contends that where a prosecutor volunteers his

reasons for exercising his peremptory challenges, the prosecutor is no longer cloaked with the presumption of correctness, but opens up the issue and the court may review his motives to determine whether the purposes of the peremptory challenge are being perverted. The court must then be satisfied that the challenges are being exercised for permissible trial-related considerations, and that the proffered reasons are genuine ones and not merely a pretext for discrimination. The Ninth and Eighth Circuit Courts of Appeals have both held that a defendant may establish a violation of the equal protection principles of Swain by such a method. Weathersby v. Morris, 708 F.2d 1493 (9th Cir. 1983); Garrett v. Morris, 815 F.2d 509 (8th Cir. 1987). The Seventh Circuit Court of Appeals in Petitioner's case refuses "to read Swain so broadly," and insists that absent evidence that establishes a pattern of systematic exclusion of blacks larger than the single case there is no basis for an equal protection challenge even if it could be demonstrated that the prosecution exercised its peremptories on the basis of race. Teague, 820 F.2d at 834 n.6. This interpretation of Swain is questionable in light of the fact that the Batson Court attributed the requirement of proof of repeated striking over a number of cases to lower courts, 106 S.Ct. at 1720, and Justice White, author of the Swain opinion, noted in his Batson concurrence that it would not be "inconsistent with Swain for the trial judge to invalidate peremptory challenges of blacks if the prosecutor, in response to an objection to his strikes, stated that he struck blacks because he believed they were not qualified to serve as jurors, especially in the trial of a black defendant." Batson 106 S.Ct at 1725 n.* (White, J., concurring). Certiorari jurisdiction should therefore be exercised by this Court to resolve the direct conflict which exists among the circuit courts of appeals regarding whether an equal protection violation may be found, consistent with Swain, in circumstances other than where a systematic pattern of exclusion occurs over a large number of cases, a question which is not resolved by Swain or Batson.

Although the Seventh Circuit opinion in this case states

that no Swain claim was raised in state court and therefore it is procedurally barred pursuant to Wainwright v. Sykes, 433 U.S. 72 (1977), this circumstance does not make it inappropriate for this Court to grant certiorari. Not only did the State waive this argument by failing to raise this objection when Weathersby was cited and argued by Petitioner in the district court and court of appeals, but the court of appeals reached this argument on its merits. Cf Granberry v. Greer, 95 L.Ed.2d 119 (1987). Moreover, since Petitioner was denied relief in the state court on the ground that a Swain equal protection analysis controlled the result, Teague, 439 N.E. at 1070, thus rejecting any equal protection claim on its merits, there has been no procedural default which bars the federal courts from addressing this issue. Ulster County Court v. Allen, 442 U.S. 140 (1979).

CONCLUSION

Wherefore, Petitioner, Frank Dean Teague, prays that a writ of certiorari issue to the United States Court of Appeals for the Seventh Circuit.

Respectfully submitted,

STEVEN CLARK
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APPENDIX A

IN THE

UNITED STATES COURT OF APPEALS

FOR THE SEVENTH CIRCUIT

No. 84-2474

UNITED STATES OF AMERICA, ex rel. FRANK TEAGUE,
Petitioner-Appellant,

v.

MICHAEL P. LANE, Director, Department of Corrections and
MICHAEL O'LEARY, Warden, Stateville Correctional Center,
Respondents-Appellees.

Appeal from the United States District Court for the
Northern District of Illinois, Eastern Division.
No. 84 C 1934 -- William T. Hart, Judge.

ARGUED APRIL 9, 1985 -- DECIDED

Before CUDAHY and COFFEY, Circuit Judges, and PECK, Senior Circuit Judge.*

CUDAHY, Circuit Judge. The question we must decide is whether the Constitution prohibits prosecutors from excluding potential jurors solely on the basis of race.

I.

Frank Teague was tried before a jury in an Illinois court and convicted of attempted murder and armed robbery. At the time of Teague's trial, each side had ten peremptory challenges

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* The Honorable John W. Peck, Senior Circuit Judge for the Sixth Circuit, is sitting by designation.

in a case of this sort, 38 Ill. Rev. Stat. § 115-4, and the state exercised all ten of its challenges to exclude black jurors. The defense also challenged one black, and there were no blacks on the resulting jury.

The defense moved for a mistrial twice, after the prosecution had used six peremptory challenges to exclude six blacks and again at the conclusion of selection proceedings; it argued that the state was denying Teague his right to a trial by a jury of his peers by excluding prospective jurors on the basis of race. These motions were denied. A prosecutor need not defend his peremptory challenges, as things now stand. Nevertheless, the state in this case offered reasons for the choices that were made: it said that it was attempting to obtain a balance of men and women and that numerous individuals who were excused were of "very young years."

The Illinois Appellate Court took note of the state's rationale for its actions, but also noted that "the record shows that white jurors who fell within the [gender] and age groups to which the State referred were not excused peremptorily by the State." 439 N.E.2d 1066, 1069-70 (Ill. App. 1982). It held, however, that under existing law no restriction could be placed on a prosecutor's exercise of peremptory challenges in an isolated case. 439 N.E.2d at 1071.

II.

The precise issue raised here is whether it is a violation of a defendant's sixth amendment rights for a prosecutor to use

his peremptory challenges for the purpose of excluding the members of a given race from the petit jury. We must assume, as given, that such a use is not a violation of the equal protection clause of the fourteenth amendment. Swain v. Alabama, 380 U.S. 202 (1965).

The sixth amendment question was raised, but not decided, in two recent cases in this circuit. In United States v. Clark, 737 F.2d 679 (7th Cir. 1984), we held that that the facts of the case failed to raise a presumption of racial motivation:

> But we need not decide in this case whether it is ever permissible to challenge, as racially motivated, the exercise (not pursuant to a systematic policy of racial exclusion) of a peremptory challenge; for Kunkel's lawyer failed to establish a sufficient likelihood of racial motivation to warrant the judge's holding a hearing on the question.

737 F.2d at 682. And in United States ex rel. Palmer v. DeRobertis, 738 F.2d 168 (7th Cir.), cert. denied, 105 S. Ct. 306 (1984), a habeas proceeding, we upheld the holding of the district court that the petitioner had waived the objection by failing to raise it in state court. 738 F.2d at 171.[1] In

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[1] In Palmer, the state appellate court declined to consider the issue not because it had not been raised below--which it had not--but on the ground that there was no record:

> Defendant next contends that the State improperly exercised its peremptory challenges to exclude members of his race from the jury. By agreement of the parties, no report of proceedings was had of jury selection. As a result, defendant's argument cannot be considered.

People v. Palmer, No. 80-1132, Slip Op. at 3-4 (First Judicial District, August 5, 1981).

both cases there was some consideration of the merits, but in neither case was consideration essential to the outcome. We believe that the time for deciding the issue has arrived.

A. Equal Protection.

In Swain v. Alabama, 380 U.S. 202 (1965), the Supreme Court held that it is not a denial of equal protection of the laws, under the fourteenth amendment, for a prosecutor to exercise his peremptory challenges on racial grounds, so long as such exclusion of a race from petit juries is not done in such a way as to prevent members of the race from ever serving on juries. The Court held that a prima facie case of discrimination could be established by showing that blacks had been systematically struck from trial juries; but it went on to say what would be required for such a prima facie showing, and in doing so set a standard difficult to meet: "If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome." 380 U.S. 224. But the policy must work to exclude every black in a venue, "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or victim may be." 380 U.S. 223. Swain himself had established "by competent evidence and without contradiction that not only was there no Negro on the jury that convicted and sentenced him, but also that no Negro within the memory of persons now living has ever served on any petit jury in any civil or criminal case tried in Talladega County, Alabama." 380 U.S. at 231-32

(Goldberg, J., dissenting). But since he had not established that every black excluded was excluded by the state, he did not succeed in raising an inference of systematic exclusion. See United States v. Childress, 715 F.2d 1313, 1316-17 (8th Cir. 1983), cert. denied, 104 S. Ct. 744 (1984).

The Swain case was clearly decided on equal protection grounds. Although the Court did not question the standing of the defendant Swain, the rights being asserted and the rights addressed by the Court were in large measure the rights of blacks not to be excluded from jury service. Swain's motions had claimed discrimination "against members of the Negro race in order to prevent them from serving on juries," and making it "impossible for qualified members of the Negro race to serve as jurors in this cause or any cause."[2] The Court responded that the equal protection clause did not apply unless there was

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[2] The issue was raised at trial in the Swain case in two different motions. The motion to quash the venire said in part:

> 4. Defendant avers the existence of a system or practice . . . deliberately designed to discriminate against members of the Negro race in order to prevent them from serving on juries . . . .

And the motion to declare void the petit jury selected said, in part:

> (3) That because of the systematic and arbitrary method of selecting the names of qualified male citizens . . . it is impossible for qualified members of the negro race to serve as jurors in this cause or any cause . . . .

Swain, 380 U.S. at 210-11 n.6.

a system and practice of exclusion; but that where a system and practice can be shown, proof of that

> might support a reasonable inference that Negroes are excluded from juries for reasons wholly unrelated to the outcome of the particular case on trial and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population. These ends the peremptory challenge is not intended to facilitate or justify.

380 U.S. at 224. But the right of blacks to serve on juries--a right violated, according to Swain, only when a pattern or practice of exclusion is shown--is quite distinct from the right of the defendant to a fair trial. And thus the question to what extent the defendant's right to a fair trial includes the right to have members of a given race on his jury would seem to be utterly distinct from the question answered in Swain.

B. Sixth Amendment Right to an Impartial Jury.

The fourteenth amendment guarantees not only equal protection but also due process; at the time Swain was decided, however, it was not clear precisely what jury-trial rights were guaranteed by the amendment's due process clause. It has since been held, in Duncan v. Louisiana, 391 U.S. 145 (1968), that the sixth amendment applies to the states through the fourteenth amendment; but it has not yet been resolved whether the sixth amendment right to a jury of one's peers includes the right not to have eligible jurors excluded from one's trial jury on the basis of race. Thus the question we must answer is really independent of Swain; for granted that there is no equal protection argument against such a use of peremptory

challenges, the question remains whether such an argument can be based on the due process clause and the sixth amendment.

In McCray v. New York, 103 S. Ct. 2438 (1983), the Supreme Court was given the opportunity to decide the question, but declined to grant certiorari. Justice Marshall, with whom Justice Brennan joined, dissented from the denial, arguing that Swain ought to be reconsidered in light of Taylor and other recent sixth amendment cases:

> [In Taylor v. Louisiana,] we accepted the "fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment," 419 U.S. at 530 . . . . [But the] right to a jury drawn from a fair cross-section of the community is rendered meaningless if the State is permitted to utilize several peremptory challenges to exclude all Negroes from the jury.

103 S. Ct. at 2442 (Marshall, J., dissenting from denial of certiorari). Significantly, three other justices explained that although they voted to deny certiorari, they agreed with Justice Marshall about the importance of the issue, but believed that eventual consideration by the Court would benefit by submitting the issue first to other courts. 103 S. Ct. at 2438 (Stevens, J., joined by Justices Blackmun and Powell).[3]

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[3] The Court has now granted certiorari in the case of Batson v. Kentucky, 105 S. Ct. 2111 (1985), an unpublished opinion in which the Kentucky Supreme Court rejected the defendant's sixth amendment claim in one short paragraph:

> Appellant next contends that it was error to permit the prosecuting attorney to exercise preemptory challenges to all of the blacks who were called as jurors in this case. Appellant acknowledged that the United States

(footnote continued on next page)

Thus the Court has, by five votes, effectively urged the lower courts to consider the issue that we grapple with today. The Second Circuit, in later proceedings in the McCray case itself, reached the issue. In light of the opinions accompanying the denial of certiorari, McCray had taken his case to the federal district court for a writ of habeas corpus, and the district court had ruled that the sixth amendment required judicial scrutiny of discriminatory prosecutorial challenges.[4] Relying in part on developments in the state courts in California and Massachusetts, the district court laid out a format for litigating allegations of an abuse of peremptory challenges.

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3 Continued
Supreme Court in Swain v. Alabama, 380 U.S. 202, 85 S. Ct. 824, 13 L. Ed. 2d 759 (1965), held that preemptory challenges against blacks, by themselves, do not violate the Fourteenth Amendment equal-protection clause. However, appellant urges this court to adopt the position of other states based upon the Sixth Amendment and their own state constitutions, that preemptory challenges against minority groups can be unconstitutional if they were shown to be a pattern of challenges against jurors from a discrete group and a likelihood that the challenges were based solely on group membership. People v. Wheeler, 583 P.2d 748 (Cal. 1978), and Commonwealth v. Soares, 387 N.E.2d 499 (Mass. 1979). We have recently reaffirmed our reliance upon Swain in Commonwealth v. McFerron, Ky., ___ S.W.2d ___ (1984), holding that an allegation of the lack of a fair cross-sectional jury which does not concern a systematic exclusion from the jury drum does not rise to constitutional proportions, and we decline to adopt another rule.

Batson v. Commonwealth, No. 84-SC-733-MR, slip op. at 4-5 (Kentucky, December 20, 1984).

4/ The district court also held that Swain was no longer good law, but that holding was not essential to the decision, and it was rejected by the Second Circuit.

> If the prosecution's peremptories have been used in such a way as to establish a prima facie case of racial discrimination, the presumption of proper use of the peremptory gives way and the burden shifts to the prosecution to justify its challenges on nonracial grounds. . . . [A] prima facie case of improper challenges may be established when the venire-persons excluded are members of a 'cognizable group, discrimination against which is prohibited,' and the probable reason for their exclusion is their membership in the group rather than any predisposition regarding the specific case at bar . . . . Once this showing is made, the prosecution may rebut the prima facie case by demonstrating that its peremptory challenges were motivated by perceived case-specific biases, rather than by group association.

McCray v. Abrams, 750 F.2d 1113, 1117 (2d Cir. 1984) (paraphrasing the district court opinion, 576 F. Supp. 1244, 1249 (E.D.N.Y. 1983)). Because the state court had not followed the format and inquired into discrimination, the district court ordered a new trial.

The Court of Appeals agreed that McCray had made a prima facie showing of discrimination, but reversed the grant of the writ, sending the matter back to the district court for a hearing into the state's rebuttal. 750 F.2d at 1134-35.

III.

A body of reasoning has developed which supports the Second Circuit's conclusion that the sixth amendment prohibits prosecutors from using the peremptory challenge to exclude prospective jurors on the basis of race. Because of the importance of the issue, and because there is a split in the circuits on the matter,[5] we think a careful review of the

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5 Compare Weathersby v. Morris, 708 F.2d 1493, 1497 (9th Cir. 1983) ("we . . . reject [the] contention that the

(Footnote continued on next page)

argument is in order.

As we see it, the problem arises in the first place out of the clash between two devices, both intended to secure the impartiality of the jury, and neither of which we would like to see destroyed: the peremptory challenge and the requirement of representativeness in the jury pool. For the most part they do not conflict; but where they do, as in the present case, one or the other must give way. And where one or the other must give way, the choice will depend on the policies underlying each device--taking into consideration that one is constitutionally guaranteed but the other is not--and the degree to which favoring one will require the abandonment of the other.

A. The Requirement of a Representative Jury Pool.

In Taylor v. Louisiana, 419 U.S. 522 (1975), the Supreme

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5 Continued
prosecutor's use of peremptory challenges to exclude black persons from [defendant's] petit jury violated his sixth amendment rights") and United States v. Childress, 715 F.2d 1313, 1318 (8th Cir. 1983) ("After careful consideration of [the question], we must reluctantly conclude that there is no sixth amendment exception to the equal protection analysis in Swain.") with McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984).

In addition, the Sixth Circuit, in a unanimous panel opinion, recently aligned itself with the Second Circuit's approach in McCray v. Abrams. The Sixth Circuit ruled that a prosecutor or defense counsel may not systematically exercise his peremptory challenges to discriminate racially. Booker v. Jabe, No. 83-1136 (6th Cir. October 29, 1985). We believe the Sixth Circuit standard is substantially identical to our own and that a "systematic exercise" would necessarily occur if a prosecutor or defense counsel intended to use peremptory challenges for purposes of racial exclusion.

Court held that the sixth amendment guaranteed that the jury pool from which juries are selected must be a representative cross-section of the community. At the time, Louisiana law required that no woman be selected for jury service unless she had previously filed a written declaration of her desire to serve on a jury; in the Taylor case itself, there was no woman on the venire from which the jury was drawn. Reviewing earlier cases, the Court said that "the American concept of the jury trial contemplates a jury drawn from a fair cross-section of the community." 419 U.S. at 527. It cited Smith v. Texas, 311 U.S. 128, 130 (1940), in which it had held that the exclusion of racial groups from jury service was "'at war with our basic concepts of a democratic society and a representative government,'" and went on to say:

> We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power--to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional and perhaps overconditioned or biased response of a judge . . . . This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool.

419 U.S. at 530.

As the Taylor court made clear, however, this requirement of representativeness does not extend directly to the petit jury; no defendant has the right to a trial jury that reflects the make-up of the community. But the fact that the connection is not direct does not mean that it is not there at all. In Williams v. Florida, 399 U.S. 78 (1970), the Court held that a

six-person jury was constitutionally acceptable; in Ballew v. Georgia, 435 U.S. 223 (1978), it held that a five-person jury was not. In each case the Court was guided by the need to draw a line that would preserve the possibility of a representative jury. In Williams, the Court indicated that a jury should be large enough "to promote group deliberation, free from outside attempts at intimidation, and to provide a fair possibility for obtaining a representative cross-section of the community." 399 U.S. at 100 (emphasis added). In Ballew, likewise, the Court expressed concern "about the ability of juries truly to represent the community as membership decreases below six," 435 U.S. at 242 (emphasis added), and held that "any further reduction . . . that prevents juries from truly representing their communities, attains constitutional significance," 435 U.S. at 239. See also 435 U.S. at 245 (White, J., concurring) and 435 U.S. at 246 (Brennan, J., concurring).

That is, although the sixth amendment does not guarantee a representative trial jury, it does guarantee the possibility of a representative jury. It would be odd if the right to a representative jury pool did not reach, in some way or other, into the trial jury, that is, if the sixth amendment's reach stopped with the first stage of jury selection. If the sixth amendment has implications for the jury pool, it can only be because it has some implication or other for the jury that actually sits at trial. As the the Supreme Judicial Court of

Massachusetts said in Commonwealth v. Soares, 387 N.E.2d 499, 513 (Mass. 1979):

> It is not enough that there be a representative venire or panel. The desired interaction of a cross-section of the community does not occur there; it is only effectuated within the jury room itself.

And in precisely the same vein, the Second Circuit said in McCray, 750 F.2d at 1128:

> The venire qua venire is a body that, assuredly, gives service to the community by standing ready to serve on a petit jury if called upon to do so; but it is a group that takes no action and makes no decisions. No defendant has ever been tried before a venire; the venire is not the body that deliberates in the jury room; no defendant has ever been found guilty by a venire.

Thus, as we say, it would be odd if the sixth amendment's requirement of representativeness in the jury pool were not intended to have some sort of effect in the jury room.

If the sixth amendment does guarantee something about the trial jury, then, it can only be the possibility or chance that the various groups that make up a community will be represented on the jury, and that is the conclusion that the Supreme Court drew in Williams, supra, and Ballew, supra. The six-person jury is constitutionally acceptable because it is large enough to allow for the possibility that the jury will be representative; the five-person jury is not acceptable because it does not.

This requirement that it be possible for the trial jury to be representative is not difficult to understand. For in the absence of that possibility--where members of a certain group can be excluded from service on a particular petit jury--the

negative effect upon defendants who happen to belong to that group is not difficult to imagine; and it will be especially severe where the group suffers from community prejudice. In such circumstances, the defendant may not even have the protection of the prosecutor's usual concern to bring only well-supported cases into court; for the prosecutor will know that the defendant's group will not be represented, and that he can count to some extent upon the prejudice of the community. The protection provided by the sixth amendment lies in the general requirement that the state cannot interfere with the possibility that the jury will be representative. And it is that requirement that explains the need for the jury pool to be actually representative, which would otherwise be a great mystery.

Further, in a case of this sort the perception is almost as important as the reality. Knowledge that blacks could be excluded at will by prosecutors trying black defendants, for example, would lead to cynicism among blacks in regard to the jury system. The importance of a general confidence in the accuracy of the penal system--confidence that the guilty tend to be convicted and the innocent tend to be acquitted--should not be underestimated; such confidence is crucial to the deterrent effect punishment must have. We do not increase general respect for the law by simply making it easier to get convictions; and we cannot increase the respect a certain group has for the law by simply making it easier to convict members of that group. There must be the accompanying perception that

the law operates with some precision, tending to convict all and only those who are guilty. In the extreme case, the law would convict members of a group arbitrarily or at random; and of course in that case punishment would have no effect at all. But if members of a group that suffers from prejudice can be tried before juries from which fellow group members have been excluded, to some extent convictions may be perceived as attributable to prejudice against the group and therefore arbitrary. To the extent that they are so perceived, the purpose of punishment is defeated.

We think it is beyond dispute, therefore, that although the sixth amendment does not give the defendant the right to a representative trial jury, it assures him of the possibility that his jury will contain members of the various groups in his community.

B. The Peremptory Challenge.

The conclusion we draw is that the prosecutor ought not to be able to eliminate jurors solely on the basis of race (or sex, or religion). And yet the peremptory challenge--the exclusion of a juror without explanation or reason--is itself one of the mechanisms for insuring the impartiality of the jury; and how can that mechanism survive if the exercise of such challenges is restricted and made subject to objection?

There is no constitutional right to peremptory challenges, of course. See Swain, 380 U.S. at 219; Stilson v. United States, 250 U.S. 583, 586 (1919). Nevertheless the peremptory

challenge has a long history and serves an important function, and should not be lightly abandoned.

The point of all challenges is to remove jurors who are inclined to be biased. The peremptory challenge allows each side to eliminate jurors it suspects, for reasons it cannot articulate, or for reasons that do not reach the level of cause, of being partial to the other side. Where challenges are used in that way, the resulting jury should be closer to the ideal of a body without sympathies for either side. Since the selection of juries from the master roll is more or less random, the problem of one-sided sympathies in a group drawn for service on a particular day is not far-fetched; and thus the peremptory challenge has an important function, along with the challenge for cause, in our rough and ready system for arriving at impartiality.

And yet the peremptory challenge is in obvious conflict with the goal of securing to each defendant the chance of a representative jury. For with enough peremptory challenges, a prosecutor can, if he chooses, make sure that members of a minority group in the community do not appear on any jury on which their presence would be an inconvenience for him.

C. The Resolution.

We must choose, therefore, whether it is the peremptory challenge or the requirement of representativeness that must give way. We have no doubt that, if we were to insist on preserving the peremptory challenge as it is, immune to objection in any given case, the constitutional goal of

representativeness would be thwarted entirely. The right to a representative venire would avail no particular defendant; the appearance of particular groups on his jury would be entirely in the hands of the prosecutor. And what prosecutor is so superhuman as to neglect an opportunity granted him by law to stack the jury against the defendant? If he is a conscientious and agressive prosecutor, he will pass up the opportunity to eliminate blacks in the trial of a black only if he thinks it would do him no good, and thus blacks would be assured of the chance to have blacks on their jury only when it would make no difference. And that means that, for minority groups that have traditionally been the object of prejudice, the guarantee of representativeness would amount to nothing at all.

We think that the only option open to us, therefore, is to limit the peremptory challenge in some way. Our aim is to find a way that will require as little modification as possible.

One suggestion, implemented recently by the Supreme Court of Illinois, see 105 Ill.2d (advance sheet), April 17, 1985, p. 7, is to reduce the number of peremptory challenges available to either side. Although any reduction in the number of challenges lessens the ability of the state to prevent groups from finding places on the jury, we do not follow the Illinois court, for two reasons. For one thing, the number of challenges would have to be reduced radically to have a significant effect, and we do not think that the problem we are faced with necessitates what would amount to the practical elimination of the peremptory challenge. The Illinois rule has been changed from ten to seven in cases of this sort, a

reduction that a dissenting justice argued was too little to do much good. Id. at 9. But a more effective reduction--to three, say--is in effect an elimination of the peremptory challenge as we know it.

For another thing, more goes into the determination of the number of challenges than considerations of representativeness, and we think that the legislatures are better equipped to make that sort of determination than are the courts. For that reason, it would be inappropriate to hold that the constitution mandates a limit on the number of peremptory challenges.

The better course seems to us to be the one adopted by federal courts in the exercise of their supervisory powers over the lower courts; by some state courts, interpreting both their own constitutions and the sixth amendment; and by the Second Circuit in McCray. We hold, accordingly, that the prosecutor's right to reject jurors peremptorily is limited by the procedure to be set out below. We find that this limitation preserves the prosecutor's use of peremptory challenges except in extreme cases of discriminatory abuse.

Relying on the supervisory power and not on the constitution, a number of circuits have placed such limits on the use of peremptory challenges in federal courts. See United States v. Leslie, 759 F.2d 366, 374 (5th Cir. 1985) (en banc); United States v. Jackson, 696 F.2d 578, 593 (8th Cir. 1982), cert. denied, 460 U.S. 1073 (1983). See also United States v. McDaniels, 379 F. Supp. 1243, 1249 (E.D. La. 1974). As the Fifth Circuit said in Leslie:

> We thus invoke our supervisory power to assure a minimum level of protection against the use of peremptory challenges to practice invidious racial discrimination in individual cases. We recognize that giving effect to the precept of equality conficts with the total peremptoriness of peremptory challenges on the part of the prosecutor but hold that at some point the threat of invidious discrimination by federal officers sworn to effect justice exceeds the bounds of tolerance.

759 F.2d at 373. Nevertheless:

> We do not go so far as to hold that racial consideration in every case invariably constitutes invidious racial discrimination.

Rather,

> [t]he district court has [the burden of deciding if peremptory challenges have been used for] unjustifiable racially discriminatory reasons.

759 F.2d at 374.

State Supreme Courts in Florida, Massachusetts and California have hammered out similar compromises. State v. Neil, 457 So.2d 481 (Fla. 1984); Commonwealth v. Soares, 387 N.E.2d 499 (Mass. 1979); People v. Wheeler, 583 P.2d 748 (Cal. 1978). In Soares, the Massachusetts court said:

> In fashioning a balance between the goal of diffused impartiality in the petit jury and the limitations inherent in a feasible and fair process of jury selection, we preserve a legitimate and significant role for the peremptory challenge . . . .
>
> What we view [the Massachusetts] Declaration of Rights as proscribing is the use of peremptory challenges to exclude prospective jurors solely by virtue of their membership in, or affiliation with, particular defined groupings in the community. Were we to decline so to hold, we would leave the right to a jury drawn from a representative cross-section of the community wholly susceptible to nullification through the intentional use of peremptory challenges to exclude identifiable segments of that community.

387 N.E.2d at 515.

And finally in McCray, the Second Circuit chose the same sort of solution:

> [The peremptory challenge] is an important right; it may be an invaluable right in certain circumstances; but it is not a right of constitutional dimension . . . . [w]hen . . . the prosecution's use of its peremptories conflicts with a fundamental right that is protected by the Sixth Amendment, it is the inscrutability of the peremptory challenge that must yield, not the constitutional right.
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> . . .
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> Accordingly, we conclude that a defendant may appropriately subject to scrutiny under the Sixth Amendment the prosecution's use of its peremptory challenges on the basis of its actions in his own particular case.

750 F.2d at 1130-31.

This, as we say, seems to us the better approach. We leave to the legislatures to decide the appropriate number of peremptory challenges. We decide only that the prosecutor's use of such challenges is not unrestricted, even in the particular case; that such challenges are properly exercised against specific biases; and that the obvious abuse of those challenges is subject to the procedure set out below.

D. The Format for Protesting Abuse of the Peremptory Challenge.

In Wheeler, the California court rejected the statistical analysis used in determining discrimination in venires as inappropriate, and opted for "more traditional procedures." It has been followed in this by the Second Circuit in McCray v. Abrams; in Massachusetts, Commonwealth v. Soares, 387 N.E.2d 499 (1979); and in New Mexico, State v. Crespin, 612 P.2d 716 (N.M. App. 1980). According to the procedure adopted by these courts, the defendant must raise a timely objection and make a

prima facie case. He must show that the persons excluded are members of a cognizable group "within the meaning of the representative cross section rule." Wheeler, 583 P.2d at 764; see Soares, 387 N.E.2d at 517. Without exploring further the question just what groups these are, see Duren v. Missouri, 439 U.S. 357, 364 (1979), we note that race is surely one.

To make the prima facie case, the defendant must also show a likelihood that those challenged are more likely to have been challenged because of the group they belong to than because of any specific bias. Wheeler at 764; Soares at 517; McCray at 1132. Wheeler suggested some ways in which such a showing could be made:

> The party may show that his opponent has struck most or all of the members of the identified group from the venire, or has used a disproportionate number of his peremptories against the group.

583 P.2d at 764. Such evidence is indeed relevant, but it may not be conclusive. If, for example, there are only three blacks on a panel, it may be more difficult to persuade a trial judge of racial animus when the prosecutor eliminates them than in the case in which there are eight blacks on a panel, and most or all are challenged. The strongest case, of course, will be where the prosecutor has used most or all of his challenges to remove most or all of the blacks on the panel. We note with approval the Wheeler admonition that the defense make "as complete a record of the circumstances as is feasible." Id.

Once the prima facie case has been made, it will be up to the prosecutor to rebut it. No court that has addressed this

issue has seen fit to require a showing of cause for each juror rejected; all that is necessary is that the prosecutor indicate some basis for supposing bias, even though it would not support a challenge for cause. The appropriate rebuttal involves bias, of course, because bias--specific bias grounded in personal history or conduct--is supposed to be the reason for challenges in the first place. "Such reasons, if they appear to be genuine, should be accepted by the court." McCray at 1132. If they do not appear to be genuine, the court will call for a new panel, and the process of selecting a jury will begin again.

Although we say, therefore, that the prosecutor has no right to peremptorily exclude jurors because of race, in practical effect what we mean is that the prosecutor may not go so far as to create a prima facie case; and if he does go that far he will be required to come up with a plausible explanation. The procedure we have set down does not in fact prevent the prosecutor from excluding two, or three, or four on the basis of race, or sex, or religion; but it should prevent him from either using his peremptories to exclude all members of a certain group, where a fair number of members of that group appear in the panel, or using all his peremptories to exclude members of a certain group. Either one will raise a presumption of intentional interference with defendant's sixth amendment rights.

All of this falls far short of destroying the peremptory challenge. The prosecutor is free to use his challenges as he chooses, so long as he does not use them for the impermissible purpose of excluding blacks, or members of other cognizable

groups, from the petit jury. We agree with the optimistic tone of the McCray opinion:

> We would think that the number of occasions in which a defendant would be able to make out a prima facie case . . . would be few; we would hope the number would decrease.

750 F.2d at 1132 (emphasis added). Indeed we would expect the number to decrease. Although we are not of the school that believes that constitutional issues are to be determined largely with an eye to the resulting burden on the courts, we are sensitive to the issue of increased litigation. In a case such as this one, uncertainty has itself led to a flow of litigation (see below, footnote 7), and we can stem the tide by resolving the issue one way or the other. If we were to decide that the peremptory challenge deserved unrestricted protection, defendants would gradually cease to raise the issue; if we decided the matter the other way, as we do, prosecutors should eventually stop the practice of excluding on the basis of race, giving fewer occasions to object, most of those easily disposed of by the trial court. Given the choice, it would be the worst sort of miscalculation to give prosecutors the go-ahead to continue the practice of exclusion just for the marginal effect it will have on the caseload.

IV.

The examination of jurors in the case before us was conducted by the trial judge. On two occasions, after the state had used six of its peremptory challenges and then again after the state had used all ten of its challenges, the defense moved for a mistrial on the grounds that the state was using

its challenges only against black jurors. The state responded to the second motion by saying that "numerous individuals that were excused were of very young years," and that the state was striving for "a balance of an equal number of men and women." The trial judge denied the motions. The Illinois Appellate Court rejected the state's explanation, but affirmed the conviction nevertheless, holding that the state's exercise of peremptory challenges could not be restricted in the absence of a Swain showing of systematic exclusion. 439 N.E.2d at 1069-71.

There is no question that a prima facie case of abuse has been made out here. Of the ten peremptory challenges the state was able to exercise in the selection of the petit jury, every one was used to excuse a black.[6] Moreover, the state's elimination of blacks had an effect: There were no black jurors on the jury finally chosen. We cannot imagine a clearer case for testing the rule.

Accordingly, the state is called upon to rebut. Since the

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[6] It is true that in the selection of the two alternates, the state exercised its one peremptory challenge against a white; but as far as we can tell, the first four jurors examined for alternate duty were all white; the defense and the state each excused one; and the remaining two alternates were both white. It is also true, as the state claims, that the defense is responsible for excusing one black from service on the jury, but the husband of that juror was a policeman and since the trial involved the shooting of a policeman the choice would seem to be justified. In any case, we do not see why the fact that the defense used one of its ten peremptories should weaken its case; it suggests that the defense was not eliminating jurors solely on the basis of race.

state did not remain silent in response to the defendant's protest, we might be able to forego a remand for a hearing into the state's explanation for its actions. For the state gave its explanation at trial, and the explanation it gave is roughly of the sort that might carry the day, if believed: it answered that it wanted to eliminate very young jurors, and to achieve some balance between males and females. Neither the Illinois Appellate Court nor the federal district court addressed the rebuttal, believing that Swain controlled in this situation. Under these circumstances, an appraisal of the rebuttal may be within our competence, eliminating the need for remand.

Nevertheless, the state may not have believed that its rebuttal was necessary, and therefore there may be some question about the fairness of taking seriously the answer that it actually gave. In these circumstances a rush to judgment may not be appropriate, and we think it better to remand for a hearing into the state's explanation than to attempt to decide the matter on the basis of the explanation already given. We are aware that an opportunity to reconsider its explanation at this late date may give the state an advantage; we have no doubt that with sufficient time an explanation could be found for the exclusion of any ten potential jurors. Still, presuming good faith on the part of the state, it is appropriate to allow the state to attempt to satisfy the district court that there was a legitimate explanation for the choices it made, and that the explanation was not pretextual.

We agree with the Illinois Appellate Court that the reason already given would appear to be pretextual. Below is a chart of jurors in the order in which they were eliminated or accepted:

ORDER OF ACCEPTANCE OR REJECTION

	STATE CHALLENGE	STATE ACCEPTANCE	DEFENSE CHALLENGE	SEATED
(1)	black male			
(2)	black female			
(3)	white male	X		
(4)	white female	X		
(5)	white male			X
(6)	black female			
(7)	black female	X		
(8)	white male			X
(9)	white male			X
(10)	black female			
(11)	white female		X	
(12)	white male		X	
(13)	black female			
(14)	black female			
(15)	white male			X
(16)	black female			
(17)	white female			X
(18)	black female			
(19)	white female			X
(20)	white male		X	
(21)	white male		X	
(22)	white male			X
(23)	white female			X
(24)	white male			X
(25)	white male			X
(26)	white male		X	
(27)	white male		X	
(28)	black female			
(29)	black female			
(30)	[peremptories exhausted]			white female
(31)	white female			
(32)	white female			

After its first challenge, every juror rejected by the state was a black woman. At that point at which the only jurors

seated were four males, the prosecution had already rejected five black women. It had also accepted three women, ultimately rejected by the defense. It is highly improbable, therefore, that in exercising its first six challenges the state was motivated to exclude women in order to achieve a balance of males and females. Of the next four jurors, all were female; the two whites were accepted by the state and seated; the two blacks were rejected by the state. By the time the tenth juror was seated, seven were male and only three female. Yet the state accepted two males, rejected by the defense, and rejected two black females. The last two women--giving the more or less balanced result of seven men and five women which the state points to in support of its explanation--were added after the state had exhausted its peremptories. Were we required to decide the matter, we would find the state's explanation that it sought to balance men and women extremely unpersuasive.

The state also claimed to be excluding jurors of "very young years." The state rejected four jurors who were college or business school students, or recent graduates; all were black women. We feel that the systematic exclusion of younger jurors would be as pernicious as the exclusion of blacks; but in any case, this explanation cannot by itself explain the state's action. This explanation we would also find less than credible.

In view, however, of the relative novelty of our holding, we believe we must remand to give the prosecution another opportunity to explain its actions. But we note that, on the

present facts, a remand would be unnecessary and perhaps undesirable in allowing the state to conjure up a rationale having little to do with the reality at trial if all parties at trial had had prior notice of today's holding. In the twenty or so years since Swain, evidence has accumulated that, if permitted, prosecutors are prepared to use the peremptory challenge to exclude blacks from juries with a cynical disregard for the rights of defendants to a jury drawn from a representative cross-section; we would suppose that the Illinois experience is more or less typical.[7] If it

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A shocking number of defendants in this State have alleged that prosecutors used peremptory challenges to exclude black people from the juries that convicted them: People v. Payne (1983), 99 Ill1.2d 135, 75 Ill. Dec. 643, 457 N.E.2d 1202; People v. Yates, (1983), 93 Ill1.2d 502 at 540, 75 Ill. Dec. 188, 456 N.E.2d 1369 (Simon, J. dissenting); People v. Cobb (1983), 97 Ill1.2d 465, 74 Ill. Dec. 1, 455 N.E.2d 31; People v. Williams (1983), 97 Ill1.2d 252, 73 Ill. Dec. 360, 454 N.E.2d 220; People v. Bonilla (1983), 117 Ill. App.3d 1041, 73 Ill. Dec. 187, 453 N.E.2d 1322; People v. Gosberry (1983), 93 Ill1.2d 544, 70 Ill. Dec. 468, 449 N.E.2d 815; People v. Davis (1983), 95 Ill1.2d 1, 69 Ill. Dec. 136, 447 N.E.2d 353; People v. Gilliard (1983), 112 Ill. App. 3d 799, 68 Ill. Dec. 440, 445 (N.E.2d 12983; People v. Newsome (1982), 110 Ill.App.3d 1043, 66 Ill. Dec. 708, 443 N.E.2d 634; People v. Turner (1982), 110 Ill. App. 3d 519, 66 Ill. Dec. 211, 442 N.E.2d 637; People v. Teague (1982), 108 Ill. App. 3d 891, 64 Ill. Dec. 401, 439 N.E.2d 1066; People v. Belton (1982), 105 Ill. Appl. 3d 10, 60 Ill. Dec. 881, 433 N.E.2d 1119; People v. Dixon (1982), 105 Ill. App. 3d 340, 61 Ill. Dec. 216, 434 N.E.2d 369; People v. Gaines (1981), 88 Ill1.2d 342, 58 Ill. Dec. 795, 430 N.E.2d 1046; People v. Mims (1981), 103 Ill. App. 3d 673, 59 Ill. Dec. 369, 431 N.E.2d 1126; People v. Lavinder (1981), 102 Ill. App. 3d 662, 58 Ill. Dec. 301, 430 N.E.2d 243; People v. Clearlee (1981), 101 Ill. App.3d 16, 56 Ill. Dec. 600, 427 N.E.2d 1005; People v. Vaughn (1981), 100 Ill. App. 3d 1082, 56 Ill. Dec. 508, 427 N.E.2d

(footnote continued on next page)

undermines public confidence in the criminal justice system to exclude blacks or women from the venire, does it not also similarly undermine public confidence to place in the hands of the prosecutor the authority to exclude all blacks from the petit jury in those cases in which he thinks it matters? What possible meaning can the sixth amendment's guarantee of a representative venire have, when the prosecutor is free to

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7 Continued

840; People v. Tucker (1981), 99 Ill. App. 3d 606, 54 Ill. Dec. 646, 425 N.E.2d 511; People v. Allen (1981), 96 Ill. App. 3d 871, 52 Ill. dec. 419, 422 N.E.2d 100; People v. Bracey (1981), 93 Ill. App. 3d 864, 49 Ill. Dec. 202, 417 N.E.2d 1029; People v. Smith (1980), 91 Ill. App. 3d 523, 47 Ill. Dec. 1, 414 N.E.2d 1117; People v. Fleming (1980), 91 Ill. App. 3d 99, 46 Ill. Dec. 217, 413 N.E.2d 1330; People v. Attaway (1976), 41 Ill. App. 3d 837, 354 N.E.2d 448; People v. Thornhill (1975), 31 Ill. App. 3d 779, 333 N.E.2d 8; People v. King (1973), 54 Ill. 2d 291, 296 N.E.2d 731; People v. Powell (1973), 53 Ill. 2d 465, 292 N.E.2d 409; People v. Patty (1972), 3 Ill. App. 3d 951, 279 N.E.2d 509; People v. Fort (1971), 133 Ill. App. 2d 473, 273 N.E.2d 439; People v. Butler (1970), 46 Ill. 2d 162, 263 N.E.2d 89; People v. Cross (1968), 40 Ill. 2d 85, 237 N.E.2d 437; People v. Dukes (1960), 19 Ill. 2d 532, 169 N.E.2d 84; People v. Harris 1959), 17 Ill. 2d 446, 161 N.E.2d 809.

People v. Payne, 457 N.E.2d 1202, 1210-11 (Ill. 1983) (Simon, J. dissenting).

It is an open secret that prosecutors in Chicago and elsewhere have been using their peremptory challenges to systematically eliminate all blacks, or all but token blacks, from juries in criminal cases where the defendants are blacks.

People v. Gilliard, 445 N.E.2d 1293 (Ill. App. 1983).

Teague v. Lane, et al.

COFFEY, Circuit Judge, dissenting. The petitioner, Frank Teague, claims that the prosecution's use of all ten of its peremptory challenges[1] to exclude blacks from the petit jury in his case denied him his right to trial by a jury of his peers in violation of the Sixth and Fourteenth Amendments. Teague is not claiming that the prosecution systematically exercised its peremptory challenges in an effort to prevent blacks from ever sitting on petit juries. Rather, Teague argues that the prosecution's use of peremptory challenges to exclude blacks in the context of the particular facts and circumstances of his case violated his Sixth Amendment rights. As I believe the United States Supreme Court decision in Swain v. Alabama, 380 U.S. 202 (1965), is clearly controlling in Teague's case, I dissent from the majority's unwarranted departure from controlling legal precedent. Furthermore, I find the arguments advanced in support of the majority's holding to be unpersuasive.

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[1] Teague was charged with attempted murder, aggravated battery, and armed robbery. Section 115-4(e) of the Illinois Code of Criminal Procedure provides in pertinent part:

> "A defendant ... shall be allowed 20 peremptory challenges on a capital case, 10 in a case on which the punishment may be imprisonment in the penitentiary [including attempted murder and armed robbery], and 5 in all other cases.... The State shall be allowed the same number of peremptory challenges as all defendants."

Ill. Rev. Stat. Ch. 38, 115-4(e).

eliminate all members of a certain race--not in every case, granted (Swain prohibits that), but in every case in which it matters?

We vacate and remand, for a hearing into the state's explanation of its challenges and other proceedings not inconsistent with this opinion.

I.

In Swain v. Alabama, 380 U.S. 202 (1965), a black defendant was convicted of rape in the circuit court of Taladega County, Alabama. The prosecution in Swain exercised its peremptory challenges to strike all six black members of the jury venire, with the result that the petit jury that convicted the defendant was without black representation. The defendant claimed that the prosecution's use of peremptory challenges to exclude all black jurors from the petit jury in his case and the prosecution's systematic use of peremptory challenges to exclude any and all blacks from ever serving on a petit jury in a criminal case in Taladega County violated the Equal Protection Clause of the Fourteenth Amendment.[2] In part II of the Swain decision, the Court addressed the defendant's claims that the exclusion of black jurors from the petit jury that convicted him violated the Equal Protection Clause. Based on the history of the peremptory challenge and its use and operation in this country, the Court recognized merit in Alabama's contention that "its system of peremptory strikes--challenges without cause, without explanation, and without judicial scrutiny--affords a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial." Id. at 211-12. The Court

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[2] The defendant in Swain also claimed that the the systematic underrepresentation of blacks on the grand and petit jury panels in Taladega County violated the equal protection clause. In Part I of its opinion, the Swain court concluded that the defendant failed to carry his burden of proof on that issue, stating, "We cannot say that purposeful discrimination based on race alone is satisfactorily proved by showing that an identifiable group in the community is underrepresented by as much as 10%." 380 U.S. at 208-09.

outlined the history of the peremptory challenge from the days of the common law of England to the law as it has developed in the United States and concluded that "[t]he persistence of peremptories and their extensive use demonstrate the long and widely held belief that the peremptory challenge is a necessary part of trial by jury. ... [T]he [peremptory] challenge is 'one of the most important of the rights secured to the accused.'" Id. at 219 (quoting Pointer v. United States, 151 U.S. 396 (1894)). But the right of peremptory challenge is not limited to the accused; the Swain court recognized that "the view in this country has been that the system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state the scales are to be evenly held.'" 380 U.S. at 220 (quoting Hayes v. State of Missouri, 120 U.S. 68, 70 (1887)).

The Swain Court described the function of the peremptory challenge as

> "not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. ... Indeed the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the voir dire and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause."

380 U.S. at 219-20. The Court further noted, "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." Id. at 220. "'[I]t is, as Blackstone says, an arbitrary and capricious right, and it must be exercised

with full freedom, or it fails of its full purpose.'" Id. at 219 (quoting Lewis v. United States, 146 U.S. 370, 378 (1892)).

With respect to the use of peremptory challenges to exclude individuals on the basis of race or other group-related characteristics, the Court stated:

> "While challenges for cause permit rejection of jurors on a narrowly specified, provable, and legally cognizable basis of partiality, the peremptory permits rejection for a real or imagined partiality that is less easily designated or demonstrable. ... It is no less frequently exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. ... Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried."

Id. at 220-21.

The Court, addressing the facts of the case, concluded:

> "[W]e cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. The challenge, pro tanto, would no longer be peremptory, each and every challenge being opened to examination, either at the time of the challenge or at a hearing afterwards. ...
>
> In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it."

Id. at 221-22.[3]

Although Justice Goldberg, joined by Chief Justice Warren and Justice Douglas, dissented from the majority opinion in Swain, the dissent did not take issue with the Supreme Court's majority holding in part II that the use of the peremptory challenge to remove blacks from a jury in a given case did not violate the Equal Protection Clause. Rather, the dissent contended that the defendant had established a prima facia case of systematic exclusion of jurors on the basis of race contrary to the majority's conclusion in part III of the Swain opinion.

> "The holding called for by this case, is that where as here a Negro defendant proves that Negroes constitute a substantial segment of the population, that Negroes are qualified to serve as jurors, and that none or only a token number has served on juries over an extended period of time, a prima facia case of the exclusion of negroes from juries is then made out. ... Such a holding would not interfere with the rights of defendants to use peremptories, nor the

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[3] In part III of its opinion, the court held that the defendant failed to carry his burden of proof of establishing a systematic use of peremptories to exclude blacks from all petit jurys. "[T]he defendant must, to pose the issue, show the prosecutor's systematic use of peremptory challenges against Negroes over a period of time." 380 U.S. at 227.

> right of the State to use peremptories, as they normally and traditionally have been used.
>
> It would not mean ... that Negroes are entitled to proportionate representation on a jury. ... Nor would it mean that where systematic exclusion of Negroes from jury service has not been shown, a prosecutor's motives are subject to question or judicial inquiry when he excludes Negroes or any other group from sitting on a jury in a particular case. Only where systematic exclusion has been shown, would the State be called upon to jusitify its use of peremptories or to negative the State's involvement in discriminatory jury selection."

Id. at 244-45 (Goldberg, J., dissenting). Thus, not one justice of the Supreme Court disagreed with the statement in Swain that "we cannot hold that the constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case." Id. at 222.[4] The Eighth Circuit in United States v. Carter, 528 F.2d 844, 850 (8th Cir. 1975), cert. denied, 425 U.S. 961 (1976), aptly summarized that "the Supreme Court in Swain made it clear that race or other group affiliation is in fact a legitimate ground for challenge in an individual case."

It is true that Swain was decided on equal protection grounds and that Teague's claim is based upon the Sixth Amendment right to a jury trial. Two recent opinions of this court reveal that the Swain analysis is also to be applied to claims arising in the context of the Sixth Amendment. In United States v. Clark, 737 F.2d 679 (7th Cir. 1984), the defendant raised a Sixth Amendment challenge to the prosecutor's use of peremptory challenges to exclude blacks from the petit jury that convicted her. Although the court did not reach the issue of whether the

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[4] Justice Black concurred in the result without filing an opinion.

Swain analysis is valid for Sixth Amendment claims, we noted with approval that "most courts have concluded that Swain is still good law fully applicable to federal as well as state trials." 737 F.2d at 682. We also noted that "several practical considerations support the majority approach." Id. In United States ex rel. Palmer v. DeRobertis, 738 F.2d 168 (7th Cir.), cert. denied, 105 S.Ct. 306 (1984), the petitioner, a black, contended that "he was denied his right to a trial by an impartial jury ... by the prosecution's peremptory challenge of blacks, with the result that no member of the jury belonged to his race." Id. at 171. The district court held that the petitioner's failure to comply with state procedural rules waived his right to raise the issue in a habeas corpus proceeding absent a showing of the cause for and the prejudice resulting from the procedural default. In determining whether the petitioner was prejudiced by the waiver, we concluded, "This case is controlled by Swain and its progeny." 738 F.2d at 172.

With the sole exception of the Second Circuit, the United States Courts of Appeals that have addressed the validity of Swain in the Sixth Amendment context have concluded that the prosecution's alleged use of peremptory challenges along racial lines in the selection of a petit jury does not deprive a defendant of the Sixth Amendment right to a trial by a jury. See United States v. Thompson, 730 F.2d 82, 85 (8th Cir.), cert. denied, 105 S.Ct. 443 (1984); Prejean v. Blackburn, 743 F.2d 1091, 1103-04 (5th Cir. 1984); United States v. Whitfield, 715 F.2d 145, 146-47 (4th Cir. 1983); Weathersby v. Morris, 708 F.2d 1493, 1497 (9th Cir. 1983), cert. denied, 104 S.Ct. 719 (1984); cf. Willis v. Zant, 720 F.2d 1212, 1219 n.14 (11th Cir. 1983), cert. denied, 104

S.Ct. 3546 (1984). Moreover, in 1983 the Supreme Court declined to grant certiorari in a case that presented the Court with an opportunity to re-examine whether the Swain analysis is applicable in the context of the Sixth Amendment. McCray v. New York, 103 S.Ct. 2438 (1983).[5]

From my research to date, I note that only the Second Circuit in McCray v. Abrams, 750 F.2d 1113 (1984), petition for cert. filed, 53 U.S.L.W. 3671 (U.S. Mar. 4, 1985) (No. 84-1426),[6] has departed from the Swain analysis in holding that the prosecution's use of peremptory challenges to exclude all blacks from the petit jury in a given case violates a defendant's Sixth Amendment right to trial by jury. But the precedential value of McCray is suspect due to the state's concession in that case that the exercise of peremptory challenges to exclude potential jurors from a petit jury solely on the basis of race

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[5] Justice Marshall, joined by Justice Brennan, dissented from the denial of certiorari on the ground that "Swain was decided before this Court held that the Sixth Amendment applies to the states through the Fourteenth Amendment ... [and] should be reconsidered in light of Sixth Amendment principles established by our recent cases." 103 S.Ct. at 2441 (Marshall, J. dissenting). Justice Stevens' opinion denying certiorari, joined by Justices Blackmun and Powell, acknowledged the importance of the issue, but concluded that the Supreme Court should allow the States to serve as "laboratories in which the issue receives further study before it is addressed by this Court." 103 S.Ct. at 2439 (Stevens, J.).

[6] Following the Supreme Court's denial of certiorari in McCray v. New York, 103 S. Ct. 2438 (1983), McCray filed a petition for habeas corpus relief in the district court. The district court, relying on the opinions accompanying the Supreme Court's denial of McCray's petition for certiorari, concluded that Swain v. Alabama was no longer good law and granted McCray's petition. McCray v. Abrams, 576 F. Supp. 1244 (E.D.N.Y. 1983). The state appealed.

violates the Sixth and Fourteenth Amendments,[7] id. at 1114, with the result that the issue of whether a potential petit juror may be peremptorily challenged on the basis of race was never raised, discussed, much less argued, before the Second Circuit panel that decided McCray. Furthermore, one of the reasons given by the McCray court in rejecting the Swain analysis was the McCray court's belief that whites are not subject to being peremptorily challenged on racial grounds.[8] Without any supporting documentation or data, McCray posited that "as a practical matter, the prosecution does not peremptorily exclude whites simply because they are whites." 750 F.2d at 1121. This premise was contradicted in Roman v. Abrams, 608 F.Supp. 629 (D.C.N.Y. 1985), one of the first reported district court decisions applying McCray, where the district court held that the prosecution's use of its eleven peremptory challenges to exclude whites from the jury that convicted a white defendant established a prima facia case that the white jurors were excluded solely because of their race. Id. at 642. Thus, McCray cannot reasonably be construed as authority for the proposition that the exercise of peremptories on the basis of race in the selection of petit juries violates the

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[7] The state contended that the petitioner had not established a prima facie case that the prosecution used its peremptories to exclude blacks solely on the basis of race, and that if a prima facie case was established, the state was entitled to an evidentiary hearing to rebut the prima facie case. McCray, 750 F.2d at 1114.

[8] The Supreme Court in Swain reasoned to the contrary and in fact stated that "in the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause." 380 U.S. at 221.

Sixth and Fourteenth Amendments since that issue was never raised or discussed, much less argued, before the court and more importantly it was based in part on an unfounded premise that peremptory challenges are not used to exclude whites from petit juries because of their race.

The majority's excursion into constitutional decisionmaking contrary to the mandates of the nation's highest court is unwarranted in light of the precedent in Swain, the decisions in this and other circuits affirming the validity of Swain in the Sixth Amendment context, and the Supreme Court's refusal to reevaluate Swain in its denial of certiorari in McCray v. New York. This court sits "on the shores of Lake Michigan rather than the banks of the Potomac," Vail v. Board of Education of Paris Union School District No. 85, 706 F.2d 1435, 1445 (7th Cir. 1983) (Eschbach, J., concurring), aff'd 466 U.S. 377 (1984), and consequently we "must follow the decisions and interpretations of our highest court in spite of any individual predilections" we individually might possess. United States v. Chase, 281 F.2d 225, 229 (7th Cir. 1960). "Needless to say, only [the Supreme Court] may overrule one of its precedents." Thurston Motor Lines v. Jordan K. Rand, Ltd., 460 U.S. 533, 535 (1983) (per curiam).

The majority attempts to justify its departure from the bending precedent in Swain by construing Justice Stevens' opinion denying certiorari in McCray v. New York, 103 S.Ct. 2438 (1983), somehow as an invitation to federal courts to address the validity of Swain in the Sixth Amendment context in spite of the opinion's limited and exclusive reference to the States. Justice Stevens stated, "[I]t is a sound exercise of discretion for the Court to

allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court." 103 S.Ct. at 2439 (Stevens, J.) (emphasis added). Justice Stevens' limiting language absolutely expresses no such invitation to federal courts. After recognizing the important "substantive and procedural ramifications of the problem," id. at 2438, the opinion acknowledged that as of that date only two States out of fifty had ruled that a criminal defendant's rights under their respective state constitutions were violated in certain circumstances by the prosecutor's use of peremptory challenges to exclude members of cognizable groups from petit juries. Justice Stevens noted that the procedural and substantive issues associated with judicial review of peremptory challenges were being litigated in the States of Massachusetts and California. Thus, despite Justice Stevens limited "invitation" to the states, the majority grasps the gauntlet and charges forward to interpret Justice Stevens' opinion, along with the dissent from the denial of certiorari of Justice Marshall, joined by Justice Brennan, somehow as evidence that five justices have "effectively urged the lower courts to consider the issue." In contrast to the majority's conclusion, but consonant with Justice Stevens' reasoning and the Supreme Court's refusal to reconsider the constitutionality of the Swain analysis in the Sixth Amendment context, I am convinced that we must follow the Supreme Court's ruling and reasoning in Swain and exercise the proper respect and discretion due the United States Supreme Court and allow our nation's highest Court the opportunity to observe, review and evaluate the experiences of State courts as they interpret their

respective State constitutions.[9]

II.

Not only is the majority's holding in this case an unwarranted departure from valid and sound precedent, but the rationale advanced by the majority to support its holding is unpersuasive. The majority asserts that "the problem arises in the first place out of the clash between two devises, both intended to secure the impartiality of the jury ...: the peremptory challenge and the requirement of representativeness in the jury pool." Initially, it is obvious that there is no direct conflict between the two devices, as peremptory challenges only come into play during the selection of the petit jury, after a jury pool has been drawn and selected for a particular trial. Thus, the peremptory challenge does not "clash" with the right of a defendant to have his jury drawn from a representative jury pool. The majority manufactures a clash between the peremptory challenge and the requirement of representativeness in the jury pool only by extending the cross section requirement beyond the parameters of the area of concern delineated in the decisions of the Supreme Court.

In Taylor v. Louisiana, 419 U.S. 522 (1975), the Supreme Court held that the systematic exclusion of women from the jury pool denied the defendant his right to trial by an impartial jury drawn from a venire representing a cross-section of

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[9] Since the Supreme Court has granted certiorari in Batson v. Kentucky, 105 S.Ct. 2111 (1985), a case presenting the issue of whether the Swain analysis applies in the Sixth Amendment context, the majority's attempt to predict the Supreme Court's ruling on the issue is nothing more than needless and unwarranted speculation.

the community. Id. at 535-36. The Court emphasized:

> "[W]e impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition, ... but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups from the community and thereby fail to be reasonably representative thereof."

Id. at 538. Taylor focused on two facets of the jury selection process not present in the case before us. First, the Court required that a fair cross-section of the community be represented on jury venires and pools, but not on the specific petit jury selected for a particular case.[10] Second, the fair cross-section requirement prohibits only the systematic exclusion of prospective jurors from the entire pool or venire--that is the exclusion of jurors that is "inherent in the particular jury

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[10] It has been suggested that the Court's refusal to extend the cross-section requirement to a petit jury can be explained by several factors. First, the process of random selection may result in the under- or overrepresentation of particular groups on a venire and the removal of jurors for cause likewise may result in the under- or overrepresentation of a group on a petit jury in a given case. Second, the requirement that specific groups be represented on any given petit jury would entail tremendous administrative problems; in each case, the trial court would be called upon to examine the race, nationality, religion, occupation, and other characteristics of members of the community in relation to the facts and circumstances of the case on trial and determine which groups of the population were relevant, and thus essential to the composition of each and every petit jury. See Saltzburg & Powers, Peremptory Challenges and the Clash Between Impartiality and Group Representation, 41 Md. L.Rev. 337, 347-48 n.47 (1982).

selection process used." Duren v. Missouri, 439 U.S. 357, 366 (1979).[11] Thus, the majority is absolutely correct in asserting "[T]his requirement of representativeness does not extend directly to the petit jury; no defendant has the right to a trial jury that reflects the make-up of the community." But the majority, in order to reach a desired result, confuses the issue of the jury pool requirement and attempts to expand the cross-section requirement into the selection of the petit jury as Teague does not claim that the pool from which his jury was drawn failed to contain a fair cross-section of the community; his quarrel is with only the make-up of the petit jury (12 jurors plus 2 alternate jurors) that heard his particular case. Nor does Teague claim that it was common practice in Cook County, Illinois, to systematically exclude blacks from all petit juries. His claim is confined to the context of his specific trial. Thus, the holdings in Taylor and Duren that members of a cognizable group may not be systematically excluded from the jury venire or pool do not provide the appropriate means for analyzing Teague's claim that the use of peremptory challenges to exclude all blacks from his petit jury violated his Sixth Amendment right to trial by jury.

The majority seeks to expand and enlarge upon the reasoning of Taylor by discussing Williams v. Florida, 399 U.S. 78

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11 "In order to establish a prima facia violation of the fair-cross-section requirement, the defendant must show (1) that the group alleged to be excluded is a 'distinctive' group in the community; (2) that the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) that this underrepresentation is due to systematic exclusion of the group in the jury-selection process." Duren v. Missouri, 439 U.S. 357, 364 (1979).

(1970), and Ballew v. Georgia, 435 U.S. 223 (1978). In Williams the Supreme Court held that six person juries in state criminal trials were constitutional under the Sixth and Fourteenth Amendments. Eight years later in Ballew the court held that five person juries in state criminal trials were unconstitutional. The majority asserts that in deciding Williams and Ballew, the Supreme Court was "guided by the need to draw a line that would preserve the possibility of a representative jury." Yet, while Williams and Ballew pertain specifically to the composition of petit juries, when viewed in the proper context, they militate against the holding of the majority: the six person jury approved in Williams certainly does not guarantee that the jury will consist of a representative cross-section of the community. The Court in Williams stated:

> "[E]ven the 12-man jury cannot insure representation of every distinct voice in the community, particularly given the use of the peremptory challenge. As long as arbitrary exclusions of a particular class from the jury rolls are forbidden, ... the concern that the cross-section will be significantly diminished if the jury is decreased in size from 12 to six seems an unrealistic one."

399 U.S. at 102 (emphasis added). The Court nevertheless recognized in Ballew, "[T]he opportunity for meaningful and appropriate representation does decrease with the size of the panels." 435 U.S. at 237. Thus, it can hardly be doubted that the mathematical probability of obtaining a representative cross-section of the community is reduced when a jury is chosen consisting of six rather than twelve jurors. Notwithstanding the Court's recognition that smaller juries counteract the goal of meaningful and appropriate representation on the petit jury, the

Court in Ballev refused to retreat from its holding in Williams. The Supreme Court thus recognized that merely decreasing the possibility of obtaining a fair cross-section of the community on the petit jury does not violate the Sixth Amendment right to a trial by jury. Similarly, the right to the unrestrained exercise of peremptories in the context of the facts and circumstances of a particular case may decrease the possibility of obtaining a truly representative petit jury in a given case, but does not violate the Sixth Amendment right to a jury trial where the peremptories are not exercised systematically to exclude a cognizable group.

The majority states: "It would be odd if the right to a representative jury pool did not reach, in some way or other into the trial jury. ..." The majority thus implies in their condemnation of the peremptory challenge that the requirement of a fair cross-section on the jury venire or pool is meaningless if the prosecutor can use his peremptory challenges to exclude a member of a cognizable group from the petit jury in a given trial. However, the free and unrestrained exercise of the peremptory challenge does not eliminate the effect of representativeness in the jury pool. Judge Garwood cogently noted the beneficial effect of requiring representativeness in the jury pool despite the fact that individual jurors might be excluded from the petit jury by means of peremptory challenge:

> "Exclusion from the venire summons process implies that the government (usually the legislative or judicial branch) in its capacity as the neutral structurer of the overall justice system has generally determined that those excluded are unfit to try any case. Exercise of the peremptory challenge, by contrast, represents the discrete decision, made by one of two or more opposed litigants in

> the trial phase of our adversary system of justice, that the challenged venireperson will be more unfavorable to that litigant in that particular case, than the others on the same venire.
>
> Thus, excluding a particular cognizable group from all venire pools is stigmatizing and discriminatory in several interrelated ways that the peremptory challenge is not. The former singles out the excluded group, while individuals of all groups are equally subject to peremptory challenge on any basis, including their group affiliation. Further, venire-pool exclusion bespeaks a priori across-the-board total unfitness, while peremptory-strike exclusion merely suggests potential partiality in a particular isolated case. Exclusions from venires focuses on the inherent attributes of the excluded group and infers its inferiority, but the peremptory does not. To suggest that a particular race is unfit to judge in any case necessarily is racially insulting. To suggest that each race may have its own special concerns, or even may tend to favor its own, is not. For instance, it says nothing adverse, or either truly racial, about blacks to infer that they may be more likely to have greater antipathy to the Klu Klux Klan than whites."

United States v. Leslie, 759 F.2d 366, 392, reh'g granted, 761 F.2d 195 (5th Cir. 1985)[12] (Garwood, J., dissenting) (emphasis original).

Commentators have also noted that the requirement that

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12 In United States v. Leslie, 759 F.2d 366, reh'g granted, 761 F.2d 195 (5th Cir. 1985), the Fifth Circuit exercised its supervisory power over federal district courts and federal prosecutors to conclude that "the federal prosecutor's ... right to employ peremptory challenges without review must yield on those cases where the defendant can establish that the prosecutor misused those challenges and engaged in invidious racial discrimination." 759 F.2d at 374. But the court specifically stated, "[W]e ... need not and therefore do not consider whether the prosecutor's conduct in this case violated any of Leslie's constitutional rights." Id. As discussed below, an examination of the record in this case discloses that the prosecutor in Teague's case did not engage in invidious racial discrimination, but exercised his judgment based upon his experience and knowledge to exclude those jurors who, as revealed in voir dire questioning, would in his best judgment be unable to be fair and impartial in the context of the specific facts and circumstances of Teague's case.

jury pools represent a fair cross-section of the community has an impact on the petit jury notwithstanding the free exercise of preemptory challenges. For example:

> " The effects of eliminating an individual from a jury by the peremptory are also sufficiently unlike those of eliminating the same individual by exclusion from the jury pool that the simple rationale of Taylor does not apply. A venire member who is challenged peremptorily still has some effect on the ... impact of the jury simply by being on the venire, and hence is unlike an individual who is eliminated prior to that point. For example, if the formerly excluded women who are added to the jury venire after Taylor [are more likely to convict] than any other venire members, they will be challenged by the defense in place of the next least conviction-promoting venire members, who otherwise would have been removed. Thus, the [likelihood of conviction] will rise, even though the newly included women are removed by the peremptory."

Note, Peremptory Challenges and the Meaning of Jury Representation, 89 Yale L.J. 1177, 1192 (1980); see also Saltzburg & Powers, supra at 360.

The majority also contends that the defendant may not have the benefit of the prosecutor's concern to bring only well-supported cases into court if the prosecutor knows he can exclude all of the members of a cognizable group by means of the peremptory challenge, "for the prosecutor will know that the defendant's group will not be represented [on the petit jury], and that he can count to some extent upon the prejudice of the community." I do not agree. Initially, the record is barren of any community prejudice towards Teague, the defendant in this case. The majority assumes, without providing any supporting evidence, that a black defendant is subject to prejudice in Cook County, Illinois. I note that Cook County had a significant

number of blacks in the population providing a supply of potential black jurors to establish an appropriate balance in the jury pool at the time of Teague's trial as the population of Cook County was approximately 25% black. Thus, the majority cannot, without factual support, brazenly conclude that Teague, as a black, was subject to community prejudice in the administration of justice. Second, when a prosecutor decides to bring a defendant before the bar of justice and issues an indictment or an information, he has no way of knowing the composition or make-up of the particular jury pool from which the petit jury will be selected. Without such knowledge, the prosecutor cannot predict whether the number of peremptory challenges he is allowed will permit him to exclude all the members of the group or segment of society he wishes to exclude. For example, in Teague's case, the prosecutor had ten preemptory challenges; 36 prospective jurors were examined on voir dire before the petit jury was accepted and 4 of the prospective jurors were excused for cause. When the prosecutor brought Teague's case to trial, he could in no way predict that only 11 of the 32 prospective jurors not excused for cause would be black, thus allowing him to exclude all but one black juror (the defense exercised one of its peremptories to exclude the remaining black). Had random selection produced a jury pool containing 20 blacks rather than 11, the prosecutor would have been unable to exclude all blacks from the jury--if in fact, as the majority assumes in this case, the prosecutor desired to exclude all blacks. Judge Garwood made a similar observation:

> "[T]he general exclusion from venire pools allows the prosecutor (and the potential defendant as well) greater ability to predict, in advance of the decision to prosecute, the

> composition of the jury which will try the case. If no cognizable group is excluded from the venire formation process, the decision to prosecute (or to commit an offense) normally cannot be made with assurance that any given group will not be so represented on the particular venire from which the trial jury will be drawn that it cannot be eliminated by peremptory challenges (or can be eliminated only at unacceptable costs in terms of other peremptories foregone)."

Leslie, 759 F.2d at 393 (Garwood, J. dissenting). Thus, the free and unrestrained exercise of peremptory challenges does not eliminate the possibility of obtaining a truly representative trial jury. So long as the jury pool contains a fair cross-section of the community, the possibility of obtaining a representative trial jury remains regardless of how either party exercises its peremptory challenges. Thus, I am in agreement with the majority when it states, "[A]lthough the sixth amendment does not guarantee a representative trial jury, it does guarantee the possibility of a representative jury." But as explained above, the exercise of peremptory challenges does not eliminate the possibility and/or probability of a representative petit jury.

Further, the majority asserts:

> "Knowledge that blacks could be excluded at will by prosecutors trying black defendants ... would lead to cynicism among blacks in regard to the jury system. The importance of a general confidence in the accuracy of the penal system--confidence that the guilty tend to be convicted and the innocent tend to be acquitted--should not be underestimated; such confidence is crucial to the deterrent effect punishment must have. We do not increase general respect for the law simply by making it easier to get convictions; and we cannot increase the respect a certain group has for the law by simply making it easier to convict members of that group."

Once again the majority has made bold, unsupported, and

unwarranted assumptions concerning the functioning of our criminal justice system. Initially, the majority focuses on the "deterrent effect" of punishment, but the primary aim of punishment is not at members of society at large or members of a convicted defendant's racial or ethnic group; rather punishment is aimed primarily at deterring the convicted criminal from committing further crimes and second at deterring others from committing like crimes. Our goal is to ensure that each accused receives a fair and impartial trial, and as discussed below the use of the peremptory challenge furthers rather than hinders the selection of a fair and impartial jury in any given case. Second, the majority assumes that the exercise of peremptory challenges "make[s] it easier to get convictions" without any statistical data or factual information to support the premise. Such unsupported suppositions hardly provide an adequate basis for the radical departure from the recognized and binding precedent in Swain suggested by the majority.

The majority's analysis ignores the fact that the peremptory challenge is an essential tool not only to the prosecutor, but to the defendant as well, in their combined effort to obtain a fair and impartial petit jury in their search for the truth of the facts presented and ultimate justice for all. The "system of peremptory [challenges]--challenges without cause, without explanation, and without judicial scrutiny--affords a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial." Swain, 380 U.S. at 211-12. And the peremptory challenge "'is, as Blackstone says, an arbitrary and caricious right, and it must be exercised

with full freedom, or it fails of its full purpose.'" Id. at 219 (quoting Lewis v. United States, 146 U.S. 370, 378 (1892)). The Sixth Amendment literally provides, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury." (emphasis added) "In essence, the right to a jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors." Irvin v. Dowd, 366 U.S. 717, 722 (1961) (emphasis added). Although the Sixth Amendment provides protection only for the defendant, if we believe that the American system of justice is based on the premise that a jury trial is a search for the truth, we must acknowledge that both sides are entitled to an impartial jury. Thus, courts have recognized that "[T]he state also enjoys the right to an impartial jury." Spinkellink v. Wainwright, 578 F.2d 582, 596 (5th Cir. 1978), cert. denied, 440 U.S. 976 (1979). "[T]he system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution Between him and the State, the scales are to be evenly held.'" Swain, 380 U.S. at 220 (quoting Hayes v. State of Missouri, 120 U.S. 68, 70 (1887)); Spinkellink, 578 F.2d at 296.

Both the peremptory challenge and the requirement of a representative venire advance the constitutional goal of obtaining a fair and impartial jury in the undying quest and search for justice. And it may be that the requirement that a jury venire or pool represent a fair cross-section of the community in fact increases the necessity of employing peremptories to obtain an impartial petit jury. "In contrast to the course in England, where both peremptory challenge and challenge for cause have

fallen into disuse, peremptories were and are freely used and relied upon in this country, perhaps because juries here are drawn from a greater cross-section of a heterogeneous society." Swain, 380 U.S. at 218 (emphasis added). The Swain court acknowledged that the "peremptory challenge is a necessary part of trial by jury." Id. The Court recognized that the challenge for cause alone is insufficient to assure the impartiality of the jury in a given case. "While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory challenge permits rejection for a real or imagined partiality that is less easily designated or demonstrable." Id. at 220. Commentators have likewise noted the shortcomings of the challenge for cause:

> "[Challenges for cause] depend upon the juror's admitting actual bias or grounds for implied bias. Some jurors will intentionally deceive the court, perhaps because they are ashamed to admit attitudes that are socially unfashionable or even because they might welcome the chance to seek retaliation against a litigant. Other jurors simply are not aware of their prejudices or underestimate the impact of their biases on their ability to weight the evidence."

Babcock, Voir Dire: Preserving "Its Wonderful Power," 27 Stan. L. Rev. 545, 544 (1975); see also Saltzburg & Powers, supra at 356 ("The detection of subconscious bias is too intuitive and subjective to justify a judicial pronouncement that a juror is unable to render an impartial judgment."). Thus, courts have found it proper to exercise a peremptory challenge to exclude a juror who could not be dismissed for cause in the context of a given trial. See Dobbert v. Strickland, 718 F.2d 1518, 1524-25 (11th Cir. 1983); Jordan v. Watkins, 681 F.2d 1067, 1070 (5th Cir. 1982).

In addition to providing for the exclusion of jurors whose bias may not be able to be discovered on voir dire, the peremptory challenge frequently facilitates the exercise of a challenge for cause to the ultimate satisfaction of the parties and the relief of potentially embarrassed jurors. We must not forget that thorough and exhaustive questioning on voir dire, although not always establishing a basis for removal for cause, oft times alienates a juror to such a degree that it is necessary for the good of all concerned to strike that juror peremptorily. Without having the peremptory challenge to fall back on, counsel will have to be much more circumspect and timid in voir dire questioning to avoid alienating a juror and thus may be less effective in discovering a prospective juror's bias and ultimately less successful in fulfilling the underlying goal of obtaining a fair and impartial jury. See Babcock, supra at 555. In this vein, the Court in Swain noted, "the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on the voir dire and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause." Id. at 219-20. Consequently,

> "[t]he function of the challenge is not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. In this way the peremptory satisfies the rule that 'to perform its high function in the best way "justice must satisfy the appearance of justice." 349 U.S. 133, 136 (1955).'"

Swain, 380 U.S. at 219 (quoting In re Murchison, 349 U.S. 133, 136 (1955)).

In selecting a petit jury for a specific case, the exercise of the peremptory challenge is merely "the tactical determination of one contesting litigant's counsel that the challenged person is, under the discrete facts of that particular case, more likely to favor the other side." Leslie, 759 F.2d at 392 (Garwood, J. dissenting). As Saltzburg & Powers observed:

> "Parties ... are faced with a particular case, specific evidence, and a designated group of jurors from which to pick. They want individual jurors who will be fair to them and thus they seek a proxy, whether race or something else, that relates to the specifics of their case. The proxy must be helpful in identifying partiality, not generally, but in a very specific context."

Saltzburg & Powers, supra at 360. According to the Supreme Court, peremptory challenges may be

> "exercised on grounds normally thought irrelevant to legal proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be.... Hence veniremen are not always judged solely as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, which may include their group affiliations, in the context of the case to be tried."

380 U.S. at 220-21. Consequently, "an attorney has not only a right but an obligation to challenge a prospective juror who may be biased, even if the basis of her belief is a broad generalization, which may not in fact be true." McCray v. Abrams, 750 F.2d at 1138 (Meskill, J., dissenting) (emphasis original). Thus, to further the constitutional goal of obtaining a truly fair

and impartial jury to the best of his ability, a prosecutor or a defense attorney may at times take race or other group characteristics into account when he exercises a peremptory challenge in the context of the specific facts and circumstances of the particular case being tried. An attorney may well be subject to malpractice litigation if in fact he fails to take all relevant factors in the context of the case on trial into consideration when exercising peremptory challenges.

The majority asserts that, because of the perceived clash between peremptory challenges exercised in the course of selecting a petit jury and the requirement of representativeness in the jury pool, we must choose whether it is the peremptory challenge or the requirement of representativeness that must give way. But such a choice is not necessary. The majority goes out on an unsupported limb and states, "[I]f we were to insist on preserving the peremptory challenge as it is, immune to objection in any given case, the constitutional goal of representativeness would be thwarted entirely." As discussed above, the use of peremptory challenges in any particular case does not and cannot logically thwart the constitutional goal of representativeness, and we know of no Supreme Court case or recognized legal treatise that has ever held that the constitutional requirement of a representative cross-section reaches the petit jury in a particular trial. In fact, the case holdings are to the contrary as the Supreme Court has wisely and clearly mandated "defendants are not entitled to a jury of any particular composition." Taylor, 419 U.S. at 538. Thus, only by expanding and enlarging upon the cross-section requirement of the jury pools and venire can the majority claim

that the peremptory challenge interferes with the constitutional goal of representativeness.[13]

The majority further contends that an aggressive prosecutor would "pass up the opportunity to eliminate blacks in the trial of a black only if he thinks it would do him no good, and thus blacks would be assured of the chance to have blacks on their jury only when it would make no difference." This assumption is nothing more than a gratuitous comment, purely specious, untrue, and again without any factually documented support. The majority itself recognizes that "the peremptory challenge allows each side to eliminate jurors it suspects, for reasons it cannot articulate, or for reasons that do not reach the level of cause, of being partial to the other side." An aggressive prosecutor would thus use the peremptory challenge to exclude from the petit jury only those jurors he perceives to be partial to the defendant and aggressive defense counsel would peremptorily challenge those particular jurors he perceives to be partial to the prosecution. Accordingly, if a black defendant is

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13 The majority's reliance on the recent Sixth Circuit decision in Booker v. Jabe, No. 83-1136 (6th Cir. October 24, 1985) is suspect. The Sixth Circuit in the Booker decision and the majority in this case fail to make the critical distinction between the Sixth Amendment as it applies to the selection of members for the jury pool and the Sixth Amendment and the role of the peremptory challenge in selecting an impartial jury. Further, as in McCray, the prosecutor in Booker did not challenge the finding that he exercised his peremptory challenge on the basis of race to exclude blacks from the jury. In fact, the prosecutor noted that the reason he struck the black jurors from the petit jury was because the defense was using its peremptory challenges to strike all white jurors from the jury panel. Thus, I question the majority's characterization of the Booker decision as employing a "standard [that] is substantially identical to our own..." Majority opinion at 9, n.5.

on trial, the prosecutor would exclude a juror only if he perceived in the exercise of his best reasoned judgment, that the particular juror, white or black, would be partial to the defendant. The majority is once again guilty of making a bold unsupported statement in assuming that a prosecutor would always perceive black jurors to be the most partial towards a black defendant and denies reality and the facts of life. "[F]or instance, if a black college student is being tried in a draft registration case, the prosecutor may prefer to challenge a white social worker rather than a black veteran." McCray, 750 F.2d at 1138 (Meskill, J., dissenting).[14] The majority has also failed to provide any statistical data that has stated, much less proven, that a white juror is more likely to convict a black defendant than a black juror, or that a black juror is more likely to convict a white defendant than a white juror. Further, the majority has ignored the fact that the impact of the oath

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[14] Saltzburg & Powers suggest that the peremptory challenge incorporates an internal check against the misuse of peremptories.

> "[A] party who insists on challenging jurors on the basis of questionable stereotypes increases his chances of removing friendly jurors and decreases his opportunitites for excluding more biased veniremen, thus reducing the possibility of success at trial. If assessments of a juror's prejudices based on group affiliation is accurate, however, then counsel has exercised the challenge as it was intended--to remove the most partial jurors.
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> There are real opportunity costs, then, in exercising peremptory challenges for the wrong reasons. Those who strike jurors on grounds of race or sex or some other classification that is not a very good proxy for bias miss opportunities for more selective strikes and thus risk having a jury that is not as impartial as it might be."

Saltzburg & Powers, supra at 365.

administered to jurors is the same whether the juror be black or white. Nothing suggests that a white is any less sincere than a black, or that a black is any less sincere or dedicated than a white when the particular juror swears under oath that he will be fair and impartial and will only decide the facts of the case on the basis of the evidence presented in open court and the law as presented in the jury instructions. I believe it is unfair to assume, and there is no basis for believing that the racial make-up of the jury in this case in any way affected the defendant's constitutionally guaranteed right to a fair and impartial jury.

Since the "clash" between the peremptory challenge and requirement of representativeness perceived by the majority is based upon an unwarranted and expansive interpretation of the fair cross-section requirement and unfounded conjecture concerning the prosecutor's use of peremptory challenges in a given case, there is no need to choose between one or the other. As noted above, the peremptory challenge and the fair cross-section requirement are both necessary safeguards employed in reaching the ultimate constitutional goal of obtaining a fair and impartial jury in a given case in our never-ending search for the truth and ultimate justice in the American judicial system.

Further, even if a choice between the peremptory challenge and the fair cross section requirement is necessary, it need not be the peremptory challenge that yields. In Swain, the Court quoted the often cited language of Stilson v. United States, 250 U.S. 583, 586 (1919), that "[t]here is nothing in the Constitution of the United States which requires the Congress [or

the States] to grant peremptory challenges." 380 U.S. at 219 Yet the Swain court found the peremptory challenge to be so entwined with the concept of a fair jury trial that it upheld the unrestrained use of peremptory challenges in any given case against a claim that such use of the peremptory challenge violated the Equal Protection Clause of the Fourteenth Amendment. The Court concluded:

> "[W]e cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws. In the quest for an impartial and qualified jury, Negro and white, Protestant and Catholic, are alike subject to being challenged without cause. To subject the prosecutor's challenge in any particular case to the demands and traditional standards of the Equal Protection Clause would entail a radical change in the nature and operation of the challenge. The challenge, pro tanto, would no longer be peremptory, each and every challenge being opened to examination, either at the time of the challenge or at a hearing afterward.

Swain, 380 U.S. at 221-22.

In fact, Professor Babcock concluded that "Swain's approach to the importance of the peremptory challenge is so radically different from Stilson's ... that it could be read as a virtual overruling of Stilson." Babcock, supra at 556.[15]

Finally, the majority ignores the practical effect of its holding--the elimination and eradication of the peremptory challenge as we know it. It is ironic that the majority rejects the remedy of placing a limit on the number of peremptory challenges available to the prosecution because to be effective it

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15 Babcock notes that Stilson was based on a reading of history that has been subject to revision and correction. "[C]ontrary to the implications of Stilson, the Court in Swain found that from the time of the first jury trials, peremptory challenges were allowable in noncapital felonies." Babcock, supra at 556.

would "eliminat[e] [for all time] ... the peremptory challenge as we know it" and its value in our search for justice. In subjecting the prosecutor to an examination of his motives for excercising peremptory challenges, the majority has effectively eliminated the essential nature of the peremptory challenge. "The essential nature of the peremptory challenge is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." Swain, 380 U.S. at 220. The peremptory challenge "is, as Blackstone says, an arbitrary and capricous right, and it must be exercised with full freedom, or it fails of its full purpose," Lewis v. United States, 146 U.S. at 378, and "any system that prevents or embarrasses the full, unrestricted exercise of that right of challenge must be condemned." Pointer v. United States, 151 U.S. 396, 408 (1893). Judge Meskill clearly recognized the effect of subjecting the prosecutor's motives to examination when he stated "the result the majority reaches spells the end of the peremptory challenge as an effective jury selection tool." McCray, 750 F.2d at 1139 (Meskill, J., dissenting).

As we have previously recognized,

> "If such objections are allowed, it is hard to see how the peremptory challenge which has been called a 'necessary part of the trial by jury,' Swain v. Alabama, supra., 380 U.S. at 219, ... will survive. Whenever counsel alleged that his opponent had a racial or similar type of motivation in exercising a perepemptory challenge (whether he used that challenge to exclude a white or black--and it would have to be one or the other--or, extending the principal as one could hardly resist doing, a man or a woman, a Jew or a gentile, etc.) the opponent would have to come forward with a reason for wanting to exclude the juror. In other words he would have to

> provide good cause, or something very close to it; and the peremptory challenge would collapse into the challenge for cause."

Clark, 737 F.2d at 682. In Clark, we also noted "the potential for stretching out criminal trials that are already too long, by making the voir dire a Title VII proceeding in miniature." Id. Increasing the extent of voir dire examination to provide counsel with relevant information concerning juror biases is unnecessary, time-consuming and costly. After all, "[t]he Constitution guarantees [a defendant] a fair trial, not a perfect one." United States ex rel Crist v. Lane, 745 F.2d 476, 482 (7th Cir. 1984); see also Lutwak v. United States, 344 U.S. 604 (1958). Further, subjecting prospective jurors to an all-inclusive detailed interrogation without any restraints in open court not only impedes the timely search for justice, but all too frequently forces jurors to disclose embarrassing and immaterial information or unpopular views, and frequently generates hostility toward the litigants or the judicial system. See Saltzburg & Powers, supra at 361, 369.

The impact of the majority's holding would not be limited to the prosecution alone, but the defendant would ultimately suffer as well. As previously noted, if we believe that both the prosecution and the defendant are entitled to a fair trial, the prosecution, as well as the defendant, is entitled to an impartial petit jury. Spinkellink, 578 F.2d at 596. Thus, as we noted in Clark:

> "It would be hard to argue that only a defendant should be allowed to challenge racially motivated peremptory challenges. ... As it cannot be right to believe that racial discrimination is wrong only when it harms a criminal defendant, and not when it harms the law abiding community represented by the prosecutor, the prosecutor would be allowed to object to the defendant's making racial peremptory challenges if the defendant could object to the prosecutor's doing so. Maybe it would be better--not least from the defendants' standpoint--if neither counsel are allowed to object."

737 F.2d at 682; see also United States v. Newman, 549 F.2d 240, 250 n.8. (2nd Cir. 1977).

A further practical problem in the majority's analysis is determining when a defendant has established a prima facie case of peremptory challenges exercised on the basis of race. In Teague's case, 10 blacks were peremptorily challenged by the prosecution. But what if only five blacks had been in the jury pool and the prosecution challenged all five--would the peremptory challenge of the only five black prospective jurors demonstrate that the challeges were based on race? Or what if only two blacks were members of the jury pool? A line must be drawn somewhere, but the majority offers no guidance for determining when a defendant establishes a prima facia case of peremptory challenges impermissably based on race, but blatantly would have us cast aside the peremptory challenge as we know it and accept it today as an integral component of the American system of justice. Nor does the majority offer any guidance for determining what group characteristics may permissably be the basis of a peremptory challenge. The majority holds that race is an improper basis for peremptory challenge, but says nothing about such group characteristics as sex, age, religion, occupation, education, political affiliation, or socio-economic status. Again, the line must be drawn somewhere, but we get not even a hint from the

majority where that line should be drawn. Thus, in its attempt to do away with the peremptory challenge, the majority has failed to delineate any outer limits for the analysis it has adopted and invites endless litigation as defendants will doubtless press claims suggesting that every conceivable group characteristic is inappropriate as a basis for the exercise of peremptory challenges.

I am convinced that to fulfill its function in our constitutionally guaranteed system of trial by jury, the exercise of peremptory challenges by either party--prosecution or defense--must not be subjected to examination by the court. In this case, however, I examine the record of the voir dire in detail, including the questioning of the jurors, because of what I perceive to be a most serious unfounded accusation on the part of the defendant and his attorney that the state exercised their peremptory challenges solely on the basis of race and the majority's unfounded conclusion that a "prima facie case of abuse has been made out here." For the majority to say that the state excluded jurors on the basis of their race is unfair and inaccurate and glosses over the facts in the record. An in depth examination of the record reveals that an appropriate and valid justification existed for each and every challenge exercised by the state. Of the ten jurors excused by the state, three had family or friends involved in law enforcement; three either were victims of crimes or had family members who had been victims of crimes; two had either personally been convicted of an offense or had a family member who had been convicted of an offense; two were students with unusual demands on their time; and three jurors or members of their family had been treated by psychiatrists.

(Teague's sanity was a central issue at his trial.) Although I again must emphasize that such a review of the record to justify peremptory challenges is neither the duty nor province of the court, the record in this case clearly demonstrates that the state's exercise of peremptory challenges were fully justified and appropriate in the context of the facts and circumstances of Teague's case. The voir dire's value once again was established and an examination of the record revealed and raised legitimate concerns of the challenged juror's perceived ability to be impartial. Each of the factors recited above suggests that the prospective jurors might very well have had a subconscious partiality with respect to issues that were to be decided by the jury. Thus, these were not arbitrary exclusions of prospective jurors but were challenges based upon the prosecutor's exercise of sound judgment in the context of the facts and circumstances of Teague's case.

Further, a review of the voir dire examination of the jurors challenged by the defense reveals the presence of similar factors raising similar concerns about their ability to be impartial. Of the ten jurors challenged by the defense, two had friends or family involved in law enforcement; two had either been the victim of a crime or members of their family had been crime victims; four jurors or members of their family had been treated by psychiatrists; one recognized the name of a police officer involved in Teague's case; and one stated that she "didn't care for violence." Thus, a comparison of the responses given by those jurors excused by the prosecution and by the defense with their respective peremptory challenges reveals that they were exercised

by each party for the very same logical reasons--that is, to remove only those jurors whose backgrounds seemed to disclose facts suggesting the possibility or probability of partiality or the presence of preconceived ideas regarding key issues on trial. A close examination of the record thus discloses, contrary to the majority's conclusion, that counsel for both sides properly and legitimately exercised their peremptory challenges to remove those jurors which they determined could not be fair and impartial in evaluating the evidence and deciding the facts of Teague's case.

The majority has done nothing more than to advance a sociological theory not yet recommended, much less adopted by any Supreme Court in the history of the nation and now recognized by only 3 out of 50 States.[16] Further, the majority has failed to provide any sound, valid, or logical reasons for this court to depart from the Swain analysis when presented with a claim that the use of peremptory challenges to exclude all blacks from a petit jury violated the defendant's Sixth Amendment right to a jury trial. The free and unfettered exercise of the peremptory challenge in the context of the specific facts and circumstances of a particular case is "a necessary part of trial by jury," Swain, 380 U.S. at 219, and is essential to the selection of the fair and impartial petit jury guaranteed by the Sixth Amendment to the Constitution. The availability of the peremptory challenge "permits rejection for a real or imagined partiality that is less

16 In addition to California and Massachusets, the State of Florida has recognized that its State constitution prohibits the prosecutor's use of race as a basis for exercising peremptory challenges. See State v. Neil, 457 So.2d 481 (Fla. 1984).

easily designated or demonstrable. ... [T]he question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be." Id. at 220-21. Thus, the Supreme Court in Swain clearly held:

> "In the light of the purpose of the peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to an examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it."

Id. at 222. The majority's unwarranted and unsupported holding destroys the essence of the peremptory challenge, and "any system that prevents or embarrasses the full, unrestricted exercise of that right of challenge must be condemned." Pointer v. United States, 151 U.S. 396, 408 (1893). For the peremptory challenge "'is an arbitrary and capricious right, and it must be exercised with full freedom, or it fails of its full purpose.'" Swain, 380 U.S. at 219 (quoting Lewis v. United States, 146 U.S. 370, 378 (1892)). Thus, the majority's ill-advised, and unsupported departure from the analysis set forth in Swain v. Alabama eviscerating the effectiveness of the peremptory challenge "must be condemned." Finally, although I am convinced that an examination of the basis for the exercise of peremptory challenges would ultimately frustrate the timely search for justice and

APPENDIX B

Pittsburgh Plate Glass Co., 404 U.S. at 189, 92 S.Ct. at 402. The Board has chosen not to create an exception to section 8(d) for economic necessity. The Board's decision stems from its special understanding of the Act and of the complexities of industrial relations and, hence, warrants our deference. *N.L.R.B. v. Erie Resistor Corp.*, 373 U.S. at 236, 83 S.Ct. at 1156; *N.L.R.B. v. United Steelworkers*, 357 U.S. 357, 362-63, 78 S.Ct. 1268, 1271-72, 2 L.Ed.2d 1383 (1963). In refusing to recognize Manley's defense of economic necessity, the Board acted within its statutory authority.[8]

III

For the reasons stated above, the Board's petition for enforcement is

GRANTED.

UNITED STATES of America, ex rel. Frank TEAGUE, Petitioner-Appellant,

v.

Michael P. LANE, Director, Department of Corrections and Michael O'Leary, Warden, Stateville Correctional Center, Respondents-Appellees.

No. 84-2474.

United States Court of Appeals, Seventh Circuit.

Dec. 30, 1985

Appeal from the United States District Court for the Northern District of Illinois, Eastern Division; William T. Hart, Judge.

Patricia Unsinn, Chicago, Ill., for petitioner-appellant.

Mark Rotert, Asst. Atty. Gen., Chicago, Ill., for respondents-appellees.

Before CUMMINGS, Chief Judge, and BAUER, WOOD, CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK and RIPPLE, Circuit Judges.

ORDER

This case was argued on April 9, 1985 to a panel consisting of Judges Cudahy and Coffey, together with Senior Circuit Judge John W. Peck of the Sixth Circuit, sitting by designation.

Pursuant to Circuit Rule 16(e), the panel opinion in this case was circulated to all the judges of the court in regular active service. A majority of the judges in regular active service have voted to rehear this case *en banc*, the time of argument to be set at a date convenient to the court.

CUDAHY, Circuit Judge, dissenting.

This case involves the question whether the Constitution prohibits prosecutors from using their peremptory challenges to exclude potential jurors exclusively on the basis of race. The matter was originally heard by a panel consisting of Judge Coffey, Senior Circuit Judge John W. Peck of the Sixth Circuit, sitting by designation, and me. The panel opinion, which I wrote, vacated and remanded on the grounds that the exercise of peremptory challenges by the prosecutor in this case violated, at least prima facie, the defendant's Sixth Amend-

8. We find unconvincing Manley's argument that the Board's position contravenes the intent and purpose of the Act. Manley cites one case for example, in which the Board allowed an employer to raise a defense of economic necessity against a charged violation of section 8(d): *New York Mirror Division, Hearst Corp.*, 151 N.L.R.B. 834 (1965). Yet, that case involved the employer's sale of an entire facility. Such an action is not mandatorily negotiable under § 8(d). The fact that the Board has recognized an economic necessity defense in such circumstances in no way precludes the Board from rejecting it in the context of the instant case. The Supreme Court too has allowed an employer to assert an economic necessity defense in regard to matters of permissive bargaining in the context of a partial plant closure, but in so doing the Court expressly distinguished that issue from matters of mandatory bargaining such as the wage rates involved here. *First National Maintenance Corp. v. N.L.R.B.*, 452 U.S. 666, 675, 101 S.Ct. 2573, 2579, 69 L.Ed.2d 318 (1981).

ment right to an impartial jury. The panel opinion, together with a dissent by Judge Coffey, was then circulated under our Circuit Rule 16 to the full court, which voted to rehear the matter *en banc*. I shall briefly outline here the essential contents of the opinion of the panel majority to indicate why I believe that *en banc* review is unnecessary. Judge Peck has requested that I record his agreement with the views which follow.

Frank Teague, a black, was tried before a jury in an Illinois court and convicted of attempted murder and armed robbery. Each side had ten peremptory challenges and the state exercised all of its challenges to exclude black jurors. The defense also challenged one black, and there were no blacks on the resulting jury.

The defense moved for a mistrial, arguing that the state was denying Teague a trial by a jury of his peers by excluding potential jurors on the basis of race. These motions were denied. Although, as things now stand, a prosecutor need not defend his peremptory challenges, the state offered two rationales for its actions: that it was attempting to obtain a balance of men and women on the jury and that it had excused a number of young people. The Illinois Appellate Court noted that the record did not support the state's explanation but held that under existing law it could place no restriction on a prosecutor's use of his peremptory challenges.

The precise issue raised was whether a defendant's Sixth Amendment rights are violated when a prosecutor uses his peremptory challenges to exclude members of one race from a petit jury. Such a use is not a violation of the Equal Protection Clause of the Fourteenth Amendment, so long as the exclusion does not prevent members of a race from ever sitting on juries, "in case after case, whatever the circumstances, whatever the crime, and whoever the defendant or victim may be." *Swain v. Alabama*, 380 U.S. 202, 223, 85 S.Ct. 824, 837, 13 L.Ed.2d 759 (1965). *Swain* was clearly decided on equal protection grounds and, although the Court did not question the standing of the defendant Swain, the rights asserted and addressed by the Court were in large measure the rights of blacks who were prevented from serving as jurors. But the right to sit on a jury is quite distinct from the right of a defendant to be tried by a jury from which members of his race have not been systematically excluded.

The Fourteenth Amendment guarantees due process as well as equal protection, but at the time *Swain* was decided it was not yet settled which jury-trial rights were guaranteed by that amendment's due process clause. We now know that the Sixth Amendment applies fully to the states through the Fourteenth Amendment. *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); what has not been resolved is whether the Sixth Amendment guarantees the right to a jury from which eligible jurors have not been excluded because of their race. This question was raised but not decided in two recent cases in this circuit. *See United States v. Clark*, 737 F.2d 679 (7th Cir.1984) (facts of case failed to raise presumption of racial motivation); *United States ex rel. Palmer v. DeRobertis*, 738 F.2d 168 (7th Cir.), *cert. denied*, — U.S. —, 105 S.Ct. 306, 83 L.Ed.2d 241 (1984) (habeas petitioner waived objection by failing to raise it in state court). Other circuits have split on the question: *compare Weathersby v. Morris*, 708 F.2d 1493, 1497 (9th Cir.1983), *and United States v. Childress*, 715 F.2d 1313 (8th Cir.1983) (no Sixth Amendment right), *with McCray v. Abrams*, 750 F.2d 1113 (2d Cir.1984), *and Booker v. Jabe*, 775 F.2d 762 (6th Cir.1985); and the Supreme Court has heard oral argument on this question in an appeal from a state supreme court, *Batson v. Kentucky*, — U.S. —, 105 S.Ct. 2111, 85 L.Ed.2d 476 (1985).

As Judge Peck and I have viewed it, the question presents a clash between two devices, the peremptory challenge and the requirement of representativeness in the jury pool, both of which are intended to secure an impartial jury and neither of which we wanted to see destroyed. For

the most part they do not conflict, but when they do one must give way partially so that neither will be destroyed.

The Sixth Amendment guarantees that the jury pool from which a jury is selected must contain a representative cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). The representativeness requirement does not extend directly to the petit jury—no defendant can demand a perfect cross-section on his jury—but the fact that there is not a direct connection does not mean that there is no connection at all. If the Sixth Amendment has implications for the jury pool, that can only be because it has some implication for the jury that actually sits at trial. In *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), the Supreme Court held that a six-person jury was constitutionally acceptable, noting that a jury should be large enough "to promote group deliberation, free from outside attempts at intimidation, and to provide a *fair possibility for obtaining a representative cross-section* of the community." *Id.* at 100, 90 S.Ct. at 1906 (emphasis added). In *Ballew v. Georgia*, 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978), it held that a five-person jury was not, expressing concern about "the ability of juries truly to represent the community as membership decreases below six." *Id.* at 242, 98 S.Ct. at 1040. Although the Sixth Amendment does not guarantee a representative trial jury, it does appear to guarantee the *possibility* of a representative jury. In the absence of that possibility, the negative effect upon defendants who belong to the group excluded is not difficult to imagine; it will be especially severe where the group suffers from community prejudice. Judge Peck and I thought it beyond dispute, therefore, that the Sixth Amendment's protection lies in its requirement that the state cannot interfere with the possibility that the jury will be representative.

There is no constitutional right to peremptory challenges. *Swain*, 380 U.S. at 219, 85 L.Ed.2d at 835, but the peremptory challenge has a long history, serves an important function, and should not lightly be narrowed. The peremptory challenge allows each side to eliminate jurors whom it suspects, for reasons it cannot articulate or for reasons not reaching the level of cause, of being partial to the other side. With peremptory challenges, the resulting jury should be closer to the ideal of a body without sympathies for either side. And yet the peremptory challenge may conflict with the goal of securing to each defendant the possibility of a representative jury, for with enough peremptory challenges a prosecutor can, if he chooses, make sure that members of a minority group do not appear on any jury where their presence would be a hindrance to him.

Judge Peck and I therefore believed that the only option open to the court in these circumstances was to limit the peremptory challenge in some way. We did not believe that this mechanism for insuring jury impartiality would be destroyed if abuses of it were made subject to objection. We therefore suggested a limitation that we think would be the least intrusive while complying with the demands of the Sixth Amendment. Rather than reduce the number of peremptory challenges, as some have suggested, we sought to limit the prosecutor with a procedure that would screen out only cases of discriminatory abuse. Two circuits have placed such limits on the use of the peremptory challenge to avoid violating the Sixth Amendment. *See Booker v. Jabe*, *supra*, and *McCray v. Adams*, *supra*. A number of other circuits have done so as an exercise of their supervisory powers. *See United States v. Leslie*, 759 F.2d 366 (5th Cir.1985) (*en banc*); *United States v. Jackson*, 696 F.2d 578, 593 (8th Cir.1982), *cert. denied*, 460 U.S. 1073, 103 S.Ct. 1531, 75 L.Ed.2d 952 (1983). *See also United States v. McDaniels*, 379 F.Supp. 1243, 1249 (E.D.La.1974). State supreme courts have followed a similar route. *see State v. Neil*, 457 So.2d 481 (Fla.1984); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499 (1979); *People v. Wheeler*, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978).

According the procedure adopted by these courts and suggested by Judge Peck and me, the defendant would have to raise a timely objection and make out a prima facie case by showing that the persons excluded were members of a cognizable and suspect group and that those challenged were more likely to have been challenged because of the group they belong to than because of any specific bias. Once the prima facie case was made, it would be up to the prosecutor to rebut it. The appropriate rebuttal would involve bias, of course, because bias is supposed to be the reason for the challenges in the first place. The prosecutor's rationale would not have to be one that would sustain a challenge for cause, but it would have to be both race-neutral and supported by the record. This procedure would not prevent the prosecutor from excluding two, or three, or four of a given race, but it would prevent him from either using *all* of his peremptories to exclude members of a race, or from using his peremptories to systematically exclude all members of a race. All of this would fall short of destroying the peremptory challenge. The prosecutor would be free to use his challenges as he chose, so long as he did not use them for the unpermissible purpose of systematically excluding blacks, or members of one cognizable group, from the petit jury.

For these reasons, which were set forth at length in the proposed panel opinion, I think en banc review unnecessary, and I therefore respectfully dissent from the order directing rehearing en banc.

STATE OF MINNESOTA, by its Commissioner of Human Services, Leonard W. LEVINE, Petitioner,

v.

Margaret HECKLER, Secretary, and United States Department of Health & Human Services, Respondents.

No. 85-1001.

United States Court of Appeals, Eighth Circuit.

Submitted June 12, 1985.

Decided Dec. 12, 1985.

Rehearing Denied Jan. 6, 1986.

Secretary of Department of Health and Human Services disapproved two policies contained in Minnesota's proposed amendments to its medicaid plan. Minnesota appealed. The Court of Appeals, Fagg, Circuit Judge, held that: (1) Secretary's failure to comply with 90-day requirement did not prejudice Minnesota, (2) Secretary acted within scope of her authority in disapproving Minnesota's 15-day policy allowing recipient to remain eligible to receive medicaid benefits until 15 days after notification by local medicaid agency, and (3) termination of policy did not violate statutory provision which allows participating states that exercised option to retain eligibility standards in effect on January 1, 1972.

Affirmed.

1. Social Security and Public Welfare ⇐241.60

Limitation period of 90 days for approving state's amendments to medicaid plan is procedural rather than substantive rule, and failure to follow procedural rule will not invalidate agency action in absence of prejudice to complaining party. Social Security Act, § 1116(a)(1), as amended, 42 U.S.C.A. § 1316(a)(1).

APPENDIX C

In the

United States Court of Appeals

For the Seventh Circuit

No. 84-2474

FRANK TEAGUE,

Petitioner-Appellant,

v.

MICHAEL LANE, Director,
Department of Corrections,
and MICHAEL O'LEARY, Warden,

Respondents-Appellees.

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division.
No. 84 C 1934—William T. Hart, *Judge*.

ARGUED OCTOBER 23, 1986—DECIDED MAY 11, 1987*

Before BAUER, *Chief Judge*, CUMMINGS, WOOD, CUDAHY, POSNER, COFFEY, EASTERBROOK, and RIPPLE, *Circuit Judges*. The original panel decision in this case reversing the order of the district court that denied the appellant Frank Teague's petition for a writ of habeas corpus was vacated, *United States ex rel. Teague v. Lane*, 779 F.2d

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* The original opinion in this case with Judge John L. Coffey dissenting was circulated to the active members of the court pursuant to Circuit Rule 16(e). A Majority of the court voted to rehear the case en banc.

1332 (7th Cir. 1985), and the case set for rehearing en banc pursuant to Circuit Rule 16(e).[1] We now affirm the order of the district court denying Teague's petition for a writ of habeas corpus.

I

COFFEY, *Circuit Judge*. Teague, a black man, was convicted after a jury trial in an Illinois court for attempted murder and armed robbery.[2] In the process of selecting the *Teague* jury, the prosecution in the exercise of its peremptory challenges excluded ten black jurors. In the exercise of the defendant's peremptory challenges, the only other black on the juror list was removed. The defendant initially challenged the State's use of its peremptory challenges after the state had exercised six of its peremptories and again after jury selection was completed claiming that the State's exclusion of all blacks from the jury deprived him of his right to "trial by a jury of his peers." The trial court rejected the defendant's argument that he was deprived of a "trial by his peers" stating that "the jury appears to be a fair jury" and the Illinois Court of Appeals affirmed the defendant's conviction explaining that no restriction could be placed on a prosecutor's exercise of peremptory challenges in the absence of a demonstration that blacks had been systematically excluded under the *Swain v. Alabama* test. *People v. Teague*, 108 Ill. App. 3d 891 (1st Dist. 1982). The Illinois Supreme Court denied Teague's Petition for Leave to Appeal, 93 Ill. 2d 547 (1983), and the United States Supreme Court denied *certiorari*. 464 U.S. 867 (1983). Teague then filed a petition for a writ of habeas corpus in the federal district court. The district court denied Teague's petition for a writ of habeas corpus explaining that Teague's claim that his constitutional rights were violated by the prosecution's use of its peremptories was "foreclosed by *Swain* and the Seventh Circuit's recent decisions in *United States v. Clark* [737 F.2d 679 (7th Cir. 1984)], and *United States ex rel. Palmer v. DeRobertis*, [738 F.2d 168 (7th Cir. 1984)]."

In *Batson*, 106 S. Ct. 1712 (1986), the Supreme Court decided that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."[3] The *Batson* decision expressly overruled *Swain v. Alabama*, 380 U.S. 202 (1965), but did not address the sixth amendment question concerning the right to a trial by an impartial jury. In *Allen v. Hardy*, 106 S. Ct. 2878 (1986), the Supreme Court held that *Batson* was not to be applied "retroactively [to cases such as Teague's] on collateral review of convictions that became final before our opinion [in *Batson*] was announced."[4] However, even

[1] The rehearing en banc was postponed until after the United States Supreme Court had decided *Batson v. Kentucky*, 106 S. Ct. 1712 (1986), which was pending before the Supreme Court when we vacated the original panel decision in *Teague*.

[2] Teague was charged with attempted murder, aggravated battery, and armed robbery. Section 115-4(e) of the Illinois Code of Criminal Procedure provides in pertinent part:

> "A defendant . . . shall be allowed 20 peremptory challenges on a capital case, 10 in a case on which the punishment may be imprisonment in the penitentiary [including attempted murder and armed robbery], and 5 in all other cases. . . . The State shall be allowed the same number of peremptory challenges as all defendants."

Ill. Rev. Stat. Ch. 38, 115-4(e).

[3] The Equal Protection Clause of the Fourteenth Amendment provides: "[No state shall] deny to any person within its jurisdiction the equal protection of the laws."

[4] Teague argues that we should determine the "finality" of his appeal as of the date the Supreme Court denied *certiorari* in *McCray v. Abrams*, 103 S. Ct. 2438 (1983). However *Allen* makes clear that "finality" for purposes of the retroactive application of *Batson* is to be determined as of the date *Batson* was decided and Teague has not persuaded us that *Allen* means anything other than what it expressly states.

if *Batson* were to be applied retroactively to Teague's case, it would not control this court's disposition of Teague's petition for habeas corpus, since Teague challenges his conviction on sixth amendment[5] grounds and does not raise an equal protection claim subject to the holdings in *Batson* and *Allen*.[6]

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[5] The sixth amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

[6] Counsel for Teague asserted at oral argument that this court could decide Teague's appeal on Equal Protection grounds under *Swain v. Alabama* if we refused to apply *Batson* retroactively to Teague's appeal. Although we are persuaded by the State's argument that Teague did not specifically raise a *Swain v. Alabama* claim in the state court and therefore he is procedurally barred from doing so under *Wainwright v. Sykes*, 433 U.S. 72 (1977), we reject Teague's Equal Protection argument in substance as well. Teague did not claim in state court nor in the district court that the prosecution had engaged in the systematic exclusion of blacks from petit juries in case after case. Thus, Teague has failed to meet his initial burden under the *Swain v. Alabama* analysis. Teague also argues, based on *Weathersby v. Morris*, 708 F.2d 1493 (9th Cir. 1983), that where the prosecutor volunteers an explanation for the use of his peremptory challenges, *Swain* does not preclude the court from examining the stated reasons to determine the legitimacy of the prosecutor's motive in exercising his peremptories. This court has refused to read *Swain* so broadly. In *United States v. Clark*, 737 F.2d 679, 682 (7th Cir. 1984), we noted that absent evidence that established a pattern of systematic exclusion of blacks "larger than the single case" there was no basis for an Equal Protection challenge even if it could be demonstrated that the prosecution had exercised its peremptories on the basis of race. Accordingly, even if Teague's Equal Protection claim based on *Swain* was not barred under *Wainwright v. Sykes*, we would reject it on the basis of our prior refusal to read *Swain* as broadly as the Ninth Circuit has in *Weathersby*.

II

In *Batson v. Kentucky*, 106 S. Ct. 1712 (1986), the United States Supreme Court held that "The Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant." *Id.* at 1719. The *Batson* decision adopted a new analysis for establishing whether the prosecution's use of its peremptory challenges had violated the Equal Protection Clause and "reject[ed] this [the *Swain v. Alabama*] evidentiary formulation [for establishing Equal Protection violation] as inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause." *Id.* Under *Batson*,

> "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, *Castaneda v. Partida*, *supra*, 430 U.S., at 494, 97 S.Ct., at 1280, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' *Avery v. Georgia*, *supra*, 345 U.S., at 562, 73 S.Ct., at 892. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empanelling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination."

Id. at 1722-23. The *Swain* court refused to adopt a rule that would allow a criminal defendant to establish an Equal Protection violation simply by demonstrating that in his particular case, the prosecution had used its peremptories to remove all blacks from the jury actually empanelled to try the defendant:

> "In the light of the purpose of a peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it. Hence the motion to strike the trial jury was properly denied in this case."

380 U.S. at 223. Instead, *Swain* required that a defendant seeking to establish an Equal Protection violation must demonstrate that the prosecutor systematically used his peremptories to exclude Blacks or other suspect classes from petit juries in case after case, and not just that all Blacks were peremptorily removed from the jury in the particular defendant's case:

> "We have decided that it is permissible to insulate from the inquiry the removal of Negroes of a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, a particular defendant involved and the particular crime charged. But when the prosecutor in a county, *in case after case*, whatever the circumstances, whatever the crime and *whoever the defendant or the victim may be*, is responsible for the removal of Negroes who have been selected as qualifed jurors and the jury commissioners and who survive challenges for cause, with the result that *no Negroes ever serve on petit juries*, the Fourteenth Amendment claim takes on added significance."

Id. (emphasis added).

Batson rejected this approach as a requirement for establishing an Equal Protection violation based on the prosecutor's use of peremptory challenges. The court explained that *Swain*: "Placed on defendants the crippling burden of proof" and thus "prosecutors peremptory challenges are now arguably immune of constitutional scrutiny." 106 S. Ct. at 1720-21 (footnote omitted). Accordingly, the court in *Batson* rejected the *Swain* court's "evidentiary formulation [for establishing that a prosecutor used its peremptories for a constitutionally impermissible purpose] as inconsistent with standards that have developed since *Swain* for assessing a prima facia case under the Equal Protection Clause." *Id.* at 1719.

The *Batson* decision makes clear that the court decided the case on equal protection grounds and declined to rule on Batson's claimed sixth amendment violation:

> "We agree with the State that resolution of the petitioner's claim properly turns on application of equal protection principles and express no view on the merits of any of petitioner's Sixth Amendment arguments."

Batson, 106 S. Ct. at 1716 n. 4.[7] Although in *Batson* a criminal defendant was allowed to establish a violation of

[7] The concurring and dissenting judges apparently read footnote 4 in *Batson* as implying that the Supreme Court decided *Batson* on Equal Protection grounds even though the petitioner had never raised an Equal Protection claim. The petitioner in *Batson*, unlike Teague, objected to the prosecutor's use of peremptory challenges on Equal Protection grounds in the state trial court, and thus, there was a basis in the record for deciding *Batson* on Equal Pro-

(Footnote continued on following page)

the equal protection clause by alleging, as Teague has, that the prosecution exercised its peremptories solely on the basis of a prospective juror's race, the Supreme Court's *Allen v. Hardy*, 106 S. Ct. 2878 (1986) decision, precludes an application of the *Batson* rule to Teague's appeal. In *Allen*, decided just two months after *Batson*, the court held that *Batson* did not apply "retroactively on collateral review of convictions that became final before our opinion [in *Batson*] was announced." The court went on to explain that:

> "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for *certiorari* had elapsed before our decision in *Batson v. Kentucky*."

Id. at n. 1. Teague's appeals were rejected by the Illinois appellate courts and his petition for writ of *certiorari* from the United States Supreme Court was denied on October 3, 1983. *See Teague v. Illinois*, 464 U.S. 867 (1983). Thus, Teague's case is "final" for purposes of applying *Batson* retroactively and therefore our review of Teague's appeal is limited solely to his sixth amendment argument, an argument the Supreme Court declined to consider in *Batson*.

Essentially, Teague relies on *Smith v. Texas*, 311 U.S. 128 (1940), and subsequent Supreme Court decisions, to

[7] *continued*
tection grounds. In contrast, since Teague based his objection to the prosecutor's use of peremptories on the fair cross-section requirement of the Sixth Amendment there is no basis in the record for deciding his appeal on Equal Protection grounds. Teague's subsequent arguments in the state courts did not address Equal Protection and thus Teague's appeal is clearly distinguishable from *Batson*. Teague asserted an Equal Protection argument more than one year after his initial argument before this court pursuant to our request that the parties brief the effect on Teague's appeal of the Supreme Court's decision in *Batson*. Unfortunately for Teague, the Supreme Court's decision in *Allen* makes clear that Teague is not entitled, any more than the petitioner in *Allen*, to raise an Equal Protection claim at this stage in the proceedings.

argue that the "fair cross section of the community" requirement as found in the sixth amendment is applicable to jury pools from which the petit jury is selected to reflect the trial community and must likewise be applied to the jury ultimately empanelled (petit jury) for trial. Teague asserts that the use of peremptory challenges to exclude certain classes of a community from the petit jury in effect undermines the Supreme Court's fair cross-section requirement in the jury pool and contravenes the very idea of a jury composed of the peers and equals of the person on trial. Teague acknowledges that the Supreme Court in *Taylor v. Louisiana*, 419 U.S. 522 (1975), refused to extend the fair cross-section requirement to the petit jury, but maintains that two Supreme Court cases, *Williams v. Florida*, 399 U.S. 78 (1970), and *Ballew v. Georgia*, 435 U.S. 223 (1978), addressing the small number of jurors on petit juries support his argument that the sixth amendment requires the fair cross section principle be applied to petit juries as well as the jury pools they are drawn from. Teague asserts that *Williams v. Florida*, stands for the proposition that the sixth amendment requires that the petit jury must be selected pursuant to procedures that provide a "fair possibility" of obtaining a petit jury representative of the community. Accordingly, Teague reads the Supreme Court's determination in *Ballew v. Georgia*, that a trial by jury of less than six persons[8] violates the sixth amendment because it in effect mathematically decreases the opportunity for meaningful representation of a cross section of the community as supporting his position. Teague interprets *Ballew* as meaning that the use of peremptory challenges to remove prospective jurors on the basis of race alone violates the sixth amendment since exercising one's peremptory challenges on the basis of race alone decreases the "opportunity" for minor-

[8] The following states allow trial by a jury of less than twelve persons in felony cases: Arizona, Connecticut, Florida, Louisiana, Massachusetts, Nebraska, and Utah. *State Court Organization 1980*, National Center for State Courts (1980).

ity representation on the petit jury and thereby prevents the jury from reflecting a fair cross-section of the community. Therefore, according to Teague, the use of peremptories to remove prospective jurors on the basis of race alone violates the sixth amendment since the petit jury ultimately empanelled does not reflect a fair cross-section of the community.

Teague's argument that the petit jury should be considered the same as the jury pool for purposes of the fair cross-section requirement rests on the mistaken assumption that the word "impartial" as used in the sixth amendment requires that the petit jury reflect a cross-section of the community from which it is drawn. Teague has not argued to this court nor any of the other courts that have heard his case, that the jury that tried him was not impartial. Rather, he asserts only that the jury in his case did not represent a cross-section of the community wherein he was tried. We refuse to break new ground and read such a requirement into the sixth amendment for the decisions of the United States Supreme Court to date fail to support such an argument. Since we agree with the United States Supreme Court and not with Teague's theory that the sixth amendment requires that the petit jury be identical to the community where the jury is drawn from, we reject Teague's assertion that the prosecutor's use of his peremptories to remove ten prospective black jurors from the petit jury violated his sixth amendment right to trial by an impartial jury.

The sixth amendment provides that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

The United States Supreme Court has consistently interpreted the sixth amendment right to trial by an impartial jury to require a jury that is "indifferent" and that the petit jury be selected from a "fair cross-section of the community:" "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors," *Irwin v. Dowd*, 366 U.S. 717, 723 (1961), and "A fair possibility for obtaining a jury constituting a representative cross section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 529 (1975). In *Taylor*, the court explained:

> "The unmistakable import of this court's opinions, at least since 1940, *Smith v. Texas*, *supra*, and not repudiated by intervening decisions, is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial. Recent federal legislation governing jury selection within the federal court system has a similar thrust. Shortly prior to this court's decision in *Duncan v. Louisiana*, *supra*, the Federal Jury Selection and Service Act of 1968 was enacted. In that Act, Congress stated 'The policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.' 28 U.S.C. § 1861. In that Act, Congress also established the machinery by which the stated policy was to be implemented. 28 U.S.C. §§ 1862 through 1866. Passing this legislation, the Committee Reports of both the House and the Senate recognized that the jury plays a political function in the administration of the law and that the requirement of a jury's being chosen from a cross section of the community was fundamental to the American system of justice. Debate on the floors of the House and Senate on the Act invoked the Sixth Amendment, the Constitution generally, and prior decisions of this Court in support of the Act."

419 U.S. at 529-31 (footnotes omitted). Although the Supreme Court has interpreted the sixth amendment to require that the jury in a criminal trial be chosen from a jury pool that represents a fair cross-section of the com-

munity, it has never interpreted the explicit command of the sixth amendment that the petit jury itself be "impartial" to require that the petit jury actually represent each and every element of the community from which it is selected. Instead, the fair cross-section requirement, like all constitutionally mandated characteristics of the jury, has its origins in the purposes the Supreme Court has interpreted the sixth amendment right to jury trial to serve:

> "The purpose of the jury is to guard against the exercise of arbitrary power—to make available the common sense judgment of the community as a hedge against the over zealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of the judge. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage, but is also critical to public confidence in the fairness of the criminal justice system."

Taylor, 419 U.S. at 531 (citation omitted). Contrary to Teague's assertion that the Supreme Court decisions in *Williams* and *Apodaca v. Oregon*, 406 U.S. 404 (1972), require us to apply the fair cross-section requirement to the petit jury, those decisions, as well as the decisions in *Ballew* and *Burch v. Louisiana*, 441 U.S. 130 (1979), require only that the jury selection process provide for the "possibility" that the jury empanelled reflect a fair cross-section of the community. The decisions of the Supreme Court make clear that absent a pattern of systematic exclusion of a particular class from the petit jury, no constitutional wrong has occurred.[9] As the court explained in *Apodaca*:

[9] And the cases make clear that when a systematic pattern of exclusion is established, the Equal Protection Clause and not the sixth amendment is the constitutional provision implicated.

> "There are two flaws in this argument [that the fair cross-section requirement requires a unanimous verdict]. One is petitioners' assumption that every distinct voice in the community has a right to be represented on every jury and a right to prevent conviction of a defendant in any case. All that the Constitution forbids, however, is systematic exclusion of identifiable segments of the community from jury panels and from the juries ultimately drawn from those panels; a defendant may not, for example, challenge the makeup of a jury merely because no members of his race are on the jury, but must prove that his race has been systematically excluded. See *Swain v. Alabama*, 380 U.S. 202, 208-209, 85 S.Ct. 824, 829, 13 L.Ed.2d 759 (1965); *Cassell v. Texas*, 339 U.S. 282, 286-287, 70 S.Ct. 629, 631, 94 L.Ed. 839 (1950); *Akins v. Texas*, 325 U.S. 398, 403-404, 65 S.Ct. 1276, 1279 89 L.Ed. 1692 (1945); *Ruthenberg v. United States*, 245 U.S. 480, 28 S.Ct. 168, 62 L.Ed. 414 (1918). No group, in short, has the right to participate in the overall legal processes by which criminal guilt and innocence are determined."

406 U.S. at 413.

However, the Supreme Court decisions distinguish between the requirement that jury pools reflect a fair cross-section of the community and the requirement that a petit jury be impartial:

> "Trial by jury presupposes a jury drawn from a pool broadly representative of the community *as well as* impartial in *a specific case*."

Thiel v. Southern Pacific Company, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting) (adopted by Court in *Taylor*, 419 U.S. at 531) (emphasis added). Indeed, the Supreme Court has gone so far as to state:

> "It is fundamental in questioning the composition of a jury that a mere showing that a class was not represented in a *particular jury* is not enough."

Fay v. New York, 332 U.S. 261, 285 (1947) (emphasis added). And the court in *Taylor* read its prior decisions concerning jury composition and the fair cross-section requirement as specifically limiting the fair cross-section requirement to the jury pool from which the petit jury was ultimately empanelled:

> "It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition."

419 U.S. at 538 (citation omitted).

Thus, the decisions of the United States Supreme Court to date make clear that the fair cross-section requirement of the sixth amendment does not apply to the petit jury itself, and we are not persuaded that sufficient reasons or facts presented to us in this record give reason for us to expand the scope of the Supreme Court's holdings in Teague's case. Several factors mandate against such an unwarranted expansion. First, the process of random selection may result in the under—or over representation of particular groups on a venire and the removal of jurors for cause likewise may result in the under—or over representation of a particular group on a petit jury in a given case. Second, the requirement that a specific group be represented on any given petit jury would necessarily entail tremendous administrative problems in the empanelling of a jury; in each case, the trial court would be called upon to expend a greater amount of time in order to ascertain the race, nationality, religion, occupation, and other characteristics of members of the community in relation to the facts and circumstances of the case on trial and determine which groups of the population were relevant, and thus essential to the composition of each and every petit jury. As we noted in *Clark*, "[t]he potential for stretching out criminal trials that are already too long, by making

the voir dire a Title VII proceeding in miniature" is one of several practical considerations against requiring that the petit jury represent a cross section of the community. 737 F.2d at 682. *See also* Saltzburg and Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 Md. L. Rev. 337, 347-48 n.47 (1982). The Supreme Court acknowledged these problems in a footnote in *Batson*:

> "Similarly, though the Sixth Amendment guarantees that a petit jury will be selected from a pool of names representing a cross-section of the community, *Taylor v. Louisiana*, 419 U.S. 522 (1975), we have never held that the Sixth Amendment requires that 'petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population,' *Id.* at 538. Indeed, it would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society. Such a possibility is illustrated by the court's holding that a jury of six persons is not unconstitutional. *Williams v. Florida*, 399 U.S. 78, 102-103 (1970)."

Batson, 106 S. Ct. at 1717 n.6. In *Lockhart v. McCree*, 106 S. Ct. 1758 (1986), the Supreme Court further explained its reasons for not applying the fair cross-section requirement to the petit jury:

> "we do not believe that the fair cross-section requirement can, or should, be applied as broadly as that court attempted to apply it. We have never invoked the fair cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large. See *Duren v. Missouri*, 439 U.S. 357, 363-364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S.Ct. 692, 701-02, 42 L.Ed.2d 690 (1975) ('[W]e impose no requirement that petit juries actually chosen

must mirror the community and reflect the various distinctive groups in the population'); cf. *Batson v. Kentucky*, ___ U.S. ___, ___, n.4, 106 S.Ct. 1712, 1716, n. 4, 89 L.Ed.2d ___ (1986) (expressly declining to address 'fair cross-section' challenge to discriminatory use of peremptory challenges). The limited scope of the fair cross-section requirement is a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly 'representative' petit jury, see id., at ___, n. 6, 106 S.Ct., at 1717, no. 6, a basic truth that the Court of Appeals itself acknowledged for many years prior to its decision in the instant case. See *United States v. Childress*, 715 F.2d 1313 (CA8 1983) (en banc), *cert. denied*, 464 U.S. 1063, 104 S.Ct. 744, 79 L.Ed.2d 202 (1984); *Pope v. United States*, 372 F.2d 710, 725 (CA8 1967) (Blackmun, J.) ("The point at which an accused is entitled to a fair cross-section of the community is when the names are put in the box from which the panels are drawn"), vacated on other grounds, 392 U.S. 651, 88 S.Ct. 2145, 20 L.Ed.2d 1317 (1968). We remain convinced that an extension of the fair cross-section requirement to petit juries would be unworkable and unsound, and we decline McCree's invitation to adopt such an extension."

Further, although we believe the fair cross-section requirement aids in the selection of an impartial jury, the requirement itself does not guarantee an impartial jury—and would not even if applied to the petit jury. Thus, the parties must have peremptory challenges available to them so that they might have the opportunity to eliminate any prospective juror whom they believe may not be impartial even though the jury was drawn from a pool representing a fair cross-section of the community. Further, peremptories help to ensure impartiality by compensating for the limitations inherent in the jury system itself; there is no guarantee that any group of twelve (or six) empanelled to try a case will reflect all attitudes, beliefs, etc. in a community. To prevent the unfairness of a trial heard by

a panel of jurors slanted toward one view or another should chance so provide (i.e., random selection of the pool), the parties are allowed to exercise the right of the peremptory challenge in order that they might be able to select a jury that they believe will be impartial while serving their individual best interests in their sincere attempt to achieve justice. Peremptory challenges are consistent with the fair cross-section requirement to insure that the jury that ultimately tries the case will be impartial.

Moreover, many of the circuits that have addressed the issue of whether the fair cross section requirement of the sixth amendment mandates that the petit jury mirror the community from which it is drawn have refused to extend the fair cross section requirement to the petit jury. *See United States v. Thompson*, 730 F.2d 82, 85 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 443 (1984); *Pregean v. Blackburn*, 743 F.2d 1091, 1103-04 (5th Cir. 1984); *United States v. Witfield*, 715 F.2d 145, 146-47 (4th Cir. 1983); *Weathersby v. Morris*, 708 F.2d 1493, 1497 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 719 (1984). *Cf. Willis v. Zant*, 720 F.2d 1212, 1219 n. 14 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 3546 (1984).

Finally, extending the fair cross-section requirement to the petit jury as Teague suggests would effectively undermine the use of peremptory challenges in criminal cases. We refuse to expand or enlarge the parameters of the Supreme Court decisions addressing the fair cross section requirement, for doing so would seriously disrupt the trial process as it currently exists, especially in view of the Supreme Court's explicit statements that such an expansion is not justified. *See Taylor; Fay*. In *Swain*, the court outlined the history of the peremptory challenge from the days of the common law of England to the law as it has developed in the United States and concluded that:

"[T]he persistence of peremptories and their extensive use demonstrate the long and widely held belief that the peremptory challenge is a necessary part of

> trial by jury. . . . The [peremptory] challenge is 'one of the most important of the rights secured to the accused.' "

Swain, 380 at 219 (quoting *Pointer v. United States*, 151 U.S. 396 (1894)). But the right of the peremptory challenge is not limited to the accused. The *Swain* court recognized that: "The view in this country has been that the system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state, the scales are to be evenly held.' " 380 U.S. at 220 (quoting *Hayes v. State of Missouri*, 120 U.S. 68, 70 (1887)).

The *Swain* court described the function of the peremptory challenge as

> "Not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. . . . Indeed the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on voir dire and facilitates the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause."

380 U.S. at 219-20. The court further noted, "The essential nature of the peremptory challenges is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *Id.* at 220. " '[I]t is, as *Blackstone* says, an arbitrary and capricious right, and it must be exercised with full freedom or it fails of its full purpose.' " *Id.* at 219 (quoting *Lewis v. United States*, 146 U.S. 370, 378 (1892)).

Teague's argument that the fair cross-section requirement of the sixth amendment extends to the petit jury and restricts the use of peremptory challenges ignores the fact that the peremptory challenge is an essential tool not only to the prosecutor, but to the defendant as well, and their combined effort to obtain a fair and impartial petit

jury in their search for the truth of the facts presented and ultimate justice for all. Any requirement that would interfere with the use of peremptory challenges would harm the defendant by disarming the defendant or his attorney of the ability to rely on intuitive feelings or past trial experience in selecting the jury that will pass judgment on the defendant. The

> "system of peremptory [challenges]—challenges without cause, without explanation, and without judicial scrutiny—affords a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial."

Swain, 380 U.S. at 211-12. And the peremptory challenge " 'is, as Blackstone says, an arbitrary and capricious right, and it must be exercised with full freedom, or it fails of its full purpose.' " *Id.* at 219 (quoting *Lewis v. United States*, 146 U.S. 370, 378 (1892)). The sixth amendment literally provides, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an *impartial* jury" (emphasis added). "In essence, the right to a jury trial guarantees to the criminally accused a fair trial by a panel of *impartial*, *'indifferent'* jurors." *Irwin v. Dowd*, 366 U.S. 717, 722 (1961) (emphasis added). Although the sixth amendment provides protection only for the defendant, if we believe that the American system of justice is based on the premise that a jury trial is a search for the truth, we must acknowledge that both the prosecution and defendant are entitled to an impartial jury. Thus, the courts have recognized that "The State also enjoys the right to an impartial jury." *Spinkellink v. Wainwright*, 578 F.2d 582, 596 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979).

> "The system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against the prosecution. Between him and the State, the scales are to be evenly held.' "

Swain, 380 at 220 (quoting *Hayes v. State of Missouri*, 120 U.S. 68, 70 (1887)); *Spinkellink*, 578 F.2d at 596.

The peremptory challenge does not conflict with the right of a defendant to have his jury drawn from a representative jury pool. Both the peremptory challenge and the requirement of the representative venire advanced the constitutional goal of obtaining a fair and impartial jury in the undying quest and search for justice. And it may be that the requirement that a a jury venire or pool represent a fair cross-section of the community in fact increases the necessity of employing peremptories to obtain an impartial petit jury.

> "In contrast to the course in England, where both peremptory challenge and challenge for cause have fallen into disuse, peremptories were and are freely used and relied upon in this country, perhaps because juries here are drawn from a greater cross section of a heterogeneous society."

Swain, 380 U.S. at 218. The *Swain* court acknowledged that the "peremptory challenge is a necessary part of trial by jury." *Id.* The court recognized that the challenge for cause alone is insufficient to assure the impartiality of a jury in a given case.

> "While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory challenge permits rejection for a real or imagined partiality that is less easily designated or demonstrable."

Id. at 220. Thus, the courts have found it proper to exercise a peremptory challenge to exclude a juror who could not be dismissed for cause in the context of a given trial. *See Dobbert v. Strickland*, 718 F.2d 1518, 1524-25 (11th Cirl 1983); *Jordan v. Watkins*, 681 F.2d 1067, 1070 (5th Cir. 1982).

Finally, Teague's argument that *Williams* and *Ballew* require us to extend the fair cross-section requirement to the petit jury is likewise unpersuasive. Although *Williams* and *Ballew* pertain specifically to the composition of petit juries, when viewed in the proper context, they militate against Teague's assertion that the petit jury must contain a cross-section of the community: the six-person Florida jury approved in *Williams* certainly does not guarantee that the jury will consist of a representative cross-section of the community anymore than a 12-person jury. The Supreme Court in *Williams* stated:

> "Even the 12-man jury cannot insure representation of every distinct voice in the community, particularly given the use of the peremptory challenge. As long as arbitrary exclusions of a particular class from the jury rolls are forbidden . . . the concern that the cross section will be significantly diminished if the jury is decreased in size from 12 to 6 seems an unrealistic one."

399 U.S. at 102. The court nevertheless recognized in *Ballew*, "The opportunity for meaningful and appropriate representation does decrease with the size of the panels." 435 U.S. at 237. Thus, it can hardly be doubted that the mathematical probability of obtaining a representative cross-section of the community is reduced when a jury is chosen consisting of six rather than 12 jurors. Notwithstanding the court's recognition in *Ballew* that a five-person jury inhibits the goal of meaningful and appropriate representation on the petit jury, the court in *Ballew* declined to retreat from its holding in *Williams*. The Supreme Court thus recognized that merely decreasing the possibility of obtaining a fair cross-section of the community on the petit jury does not violate the sixth amendment right to a trial by an impartial jury. Further, the record is barren of any proof or testimony establishing community prejudice towards Teague.

The free and unrestrained exercise of peremptory challenges does not eliminate the *possibility* of obtaining a truly representative trial jury and thus does not violate the sixth amendment right to trial by an impartial jury. *See Taylor*, 419 U.S. at 529 (sixth amendment requires "[a] fair possibility for obtaining a jury constituting a representative cross section of the community"). So long as the jury pool contains a fair cross-section of the com-

munity, the possibility of obtaining a representative trial jury remains regardless of how either party exercises its peremptory challenges. Since the sixth amendment requires only that a jury be impartial, we refuse to extend the fair cross-section requirement to require that the petit jury trying a criminal defendant reflect a fair cross-section of the community wherein the trial takes place. Requiring the petit jury to mirror the community will effectively undermine the value of the peremptory challenge without appreciably increasing the ability of the defendant or the prosecution to insure that the jury ultimately empanelled is impartial as required by the sixth amendment—all at the expense of the American jury system.

III

CONCLUSION

The sixth amendment provides the defendant in a criminal proceeding with the right to a trial by an impartial jury. The Supreme Court has determined that the right to trial by an impartial jury requires that the jury pool from which the petit jury is selected reflect a fair cross-section of the community so as to make possible and probable a petit jury representative of the community in which the defendant is tried. The Supreme Court has made clear, however, that the sixth amendment does not provide the criminal defendant with the right to a petit jury of any particular composition. *Taylor v. Louisiana*, 419 U.S. 522 (1975). Since we are not persuaded by the defendant's argument nor the realities of trial that a petit jury that mirrors the community from which it is drawn guarantees an impartial jury, we are not willing to interpret the sixth amendment as prescribing limits on the prosecutor's (or defendant's) exercise of peremptory challenges. We are confident that all jurors, black, white, or any other race, creed or color, upon the taking of their oath are equally capable of performing their task impartially. To hold that the sixth amendment limits the use of peremptory challenges would undermine the use of

peremptory challenges and impair the function of the jury in criminal trials without any demonstrable improvement in the impartiality of juries. Accordingly, we affirm the district court's order denying Teague's petition for a writ of habeas corpus.

RIPPLE, *Circuit Judge*, concurring. I concur in the judgment of the court.

In my view, as Judge Cudahy points out in his dissent, Mr. Teague may properly assert an equal protection claim in this court under the unique circumstances presented here. The Supreme Court, in *Batson v. Kentucky*, 106 S. Ct. 1712, 1716 n.4 (1986), refused to hold that the petitioner was procedurally barred from obtaining relief on the basis of the equal protection clause even though he had not raised an equal protection claim. I agree with Judge Cudahy that "[i]f one has no obligation to argue to the Supreme Court itself that it overrule one of its own cases, one surely need not argue to a district court that a Supreme Court case is wrong." Dissent at 3 (Cudahy, J.).

Although the equal protection claim is properly before us under the Supreme Court's ruling in *Batson*, that Court's subsequent holding in *Allen v. Hardy*, 106 S. Ct. 2878 (1986), controls our disposition of that claim. In *Allen*, the Supreme Court held that its holding in *Batson* should not be applied retroactively to cases on collateral review of convictions that became final before the *Batson* opinion. 106 S. Ct. at 2880.

I do not believe that the sixth amendment affords Mr. Teague a basis for relief independent from the equal protection analysis set forth in *Batson*. In the period between *Swain v. Alabama*, 380 U.S. 202 (1965), and *Batson*, the sixth amendment analysis was, I respectfully suggest, simply an elliptical way for the lower courts to avoid the precedential effect of *Swain*. *See, e.g., McCray v. Abrams*,

750 F.2d 1113 (2d Cir. 1984), *vacated*, 106 S. Ct. 3289 (1986). Indeed, in *Batson* itself, the Supreme Court seemed to acknowledge that the sixth amendment argument had played this role. 106 S. Ct. at 1716 n.4. Further, in *Batson*, the Court deliberately noted that application of sixth amendment principles to the petit jury situation would indeed be difficult. *Id.* at 1716 n.6.

Moreover, in deciding that the rule in *Batson* was not retroactive for cases on collateral review, the Supreme Court quite pointedly did not distinguish between equal protection and sixth amendment policy concerns when discussing *Batson*'s theoretical underpinnings:

> By serving a criminal defendant's interest in neutral jury selection procedures, the rule in *Batson* may have some bearing on the truthfinding function of a criminal trial. But the decision serves other values as well. Our holding ensures that States do not discriminate against citizens who are summoned to sit in judgment against a member of their own race and strengthens public confidence in the administration of justice. The rule in *Batson*, therefore, was designed "to serve multiple ends," only the first of which may have some impact on truthfinding.

Allen, 106 S. Ct. at 2880 (citations omitted). Nor can we avoid noting that, in disposing of two cases after its decision in *Batson* where the lower courts had granted relief to a state prisoner on sixth amendment grounds, the Supreme Court vacated the judgments and required reconsideration in light of *Batson* and its non-retroactivity rule.[1] If the sixth amendment analysis of those courts were worthy of independent review, there was ample opportunity to undertake the inquiry or to let the judgments of the lower

[1] *Booker v. Jabe*, 775 F.2d 762 (6th Cir. 1985), *vacated sub nom. Michigan v. Booker*, 106 S. Ct. 3289, *aff'd on reconsideration*, 801 F.2d 871 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 910 (1987); *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984), *vacated*, 106 S. Ct. 3289 (1986).

courts stand. Under these circumstances, I find the subsequent denial of certiorari in *Michigan v. Booker*, 107 S. Ct. 910 (1987), when the Sixth Circuit failed to apply *Batson* and *Allen*, worthy of little weight in our determination. In my view, therefore, the court should not address Mr. Teague's sixth amendment formulation of the equal protection claim he is barred from making because of the non-retroactive application of *Batson*.

CUDAHY, *Circuit Judge*, with whom CUMMINGS, *Circuit Judge*, concurs, dissenting:

This case was heard originally by a panel consisting of Judge John W. Peck of the Sixth Circuit, Judge Coffey and me. I wrote an opinion for the majority finding that Teague had established at least a prima facie case of a violation of his constitutional rights. Judge Coffey dissented. The opinion was circulated to the active members of the court under Rule 16(e), and the court voted to hear the case *in banc*. I dissented from the order setting the case *in banc*; the order, together with my dissent (which is a much-condensed version of the original panel opinion), appears at 779 F.2d 1332 (7th Cir. 1985). I rely on that dissent as a statement of my position on the merits here. After that order but before the *in banc* court heard oral argument, the Supreme Court decided *Batson v. Kentucky*, 106 S.Ct. 1712 (1986), which, by overruling *Swain v. Alabama*, 380 U.S. 202 (1965), determined the merits of the underlying issue favorably to the position of the original panel majority.

I.

At the outset, I find the majority's procedural analysis far-fetched and overreaching, although it is unclear how

much of this really matters in the end. For example, the majority asserts that it is "persuaded by the State's argument that Teague did not specifically raise a *Swain v. Alabama* claim in the district court and therefore he is procedurally barred from doing so under *Wainwright v. Sykes*, 433 U.S. 72 (1977)." *Supra* p. 4 n.6. Presumably the majority also claims a failure to raise an equal protection claim in the state courts (which would be more relevant to *Wainwright v. Sykes*). In any event, the contention that Teague has waived his equal protection claim by failing to raise it in any of the courts prior to this one (state or federal) where the peremptory challenge issue has been argued will not stand analysis.

The short answer to these waiver arguments is that the Supreme Court itself in *Batson v. Kentucky* heard argument from the petitioner, Batson, which was directed solely to the Sixth Amendment point (and included the Fourteenth Amendment only to the extent that that amendment applied the Sixth Amendment to the states and not for equal protection purposes). The Court noted that:

> [P]etitioner has argued that the prosecutor's conduct violated his rights under the Sixth and Fourteenth Amendments to an impartial jury and to a jury drawn from a cross-section of the community. Petitioner has framed his argument in these terms in an apparent effort to avoid inviting the Court directly to reconsider one of its own precedents. On the other hand, the State has insisted that petitioner is claiming a denial of equal protection and that we must reconsider *Swain* to find a constitutional violation on this record.

106 S.Ct. at 1716 n.4.

Chief Justice Burger's dissent in *Batson* makes a major point of Batson's failure to raise an equal protection claim either in the state courts or in the Supreme Court:

> In the Kentucky Supreme Court, petitioner disclaimed specifically any reliance on the Equal Protection Clause of the Fourteenth Amendment, pressing instead only a claim based on the Sixth Amendment.
>
> . . .
>
> Even if the equal protection issue had been pressed in the Kentucky Supreme Court, it has surely not been pressed here.

106 S.Ct. at 1731 (Burger, C.J., dissenting). The Supreme Court in *Batson*, of course, ignored these arguments and so should we here. *Batson* itself is thus on all fours procedurally with *Teague*. If one has no obligation to argue to the Supreme Court itself that it overrule one of its own cases, one surely need not argue to a district court that a Supreme Court case is wrong. In *Batson* the State of Kentucky contended that an equal protection claim was being made and that *Swain* controlled. Whether or not Teague has made equal protection an issue in the Illinois courts or in the district court (and the extent to which he has is perhaps debatable),[1] he was answered at every level by the state's contention that an equal protection claim was being made and *Swain* controlled. Having itself relied upon *Swain*, the state is estopped from arguing that equal protection was not properly raised.[2]

---

[1] Teague contends that he made a *Swain*-based argument in the district court and in this court, citing *Weathersby v. Morris*, 708 F.2d 1493 (9th Cir. 1983), *cert. denied*, 464 U.S. 1046 (1984). This provides an additional answer to the waiver argument.

[2] *Wainwright v. Sykes*, 433 U.S. 72 (1977), does not help the state here because, whether or not Teague raised the equal protection issue in the Illinois courts, those courts rejected Teague's claim on its equal protection merits. *See Ulster County Court v. Allen*, 442 U.S. 140, 152-54 (1979); *United States ex rel. Ross v. Franzen*, 688 F.2d 1181, 1183 (7th Cir. 1982). The Illinois Appellate Court rejected Teague's argument because he ostensibly failed to demonstrate that blacks had been systematically precluded from jury service, as required by *Swain v. Alabama*. *People v. Teague*, 108 Ill. App. 3d 891, 895-96, 439 N.E.2d 1066, 1070 (1st Dist. 1982), *cert. denied*, 464 U.S. 867 (1983). Since the state court denied Teague relief on the ground that *Swain* controlled the result, we could

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I thus conclude that there is no barrier based on waiver, in the prior history of this litigation or in his arguments made here, to Teague's relying on *Batson* before this court. Teague's opponents in all the courts before this one have relied on *Swain* to defeat Teague's claim. Now that *Batson* has trumped *Swain*, there can be no principled objection to Teague's present reliance on *Batson*.

This still leaves us, of course, with the problem of *Batson*'s non-retroactivity under *Allen v. Hardy*, 106 S.Ct. 2878 (1986). At least *arguendo*, I would agree with the majority that Teague's claim must be sustainable on Sixth Amendment grounds in order to avoid the *Batson* non-retroactivity hurdle erected in *Allen*.

Teague's case is thus entirely parallel to *Booker v. Jabe*, 775 F.2d 762 (6th Cir. 1985). There the Sixth Circuit, on facts similar to those before us, used a Sixth Amendment analysis to decide that the use of peremptory challenges to exclude blacks from a petit jury was unconstitutional. The State of Michigan petitioned for certiorari and, while the petition was pending, the Supreme Court decided both *Batson* and *Allen*. The Court then vacated the judgment in *Booker* and remanded the case to the Sixth Circuit for reconsideration in light of *Batson* and *Allen*. *Michigan v. Booker*, 106 S.Ct. 3289 (1986).

[2] *continued*
reach the equal protection claim without concerning ourselves with the cause-and-prejudice standard.

As noted, each time Teague has argued a constitutional violation, whether in the state or federal courts, his opponent and the court in question has cited *Swain* as the controlling authority. Two issues may, of course, be so factually and logically related that the raising of one affords the state courts a fair opportunity to consider both. *Williams v. Holbrook*, 691 F.2d 3, 8 (1st Cir. 1982). The majority cannot plausibly conclude that Teague is now making a new or different argument when the other state and federal courts which have heard the matter have determined that *Swain* was dispositive.

On remand, the Sixth Circuit reinstated the *Booker* judgment and opinion, *Booker v. Jabe*, 801 F.2d 871 (6th Cir. 1986); the State of Michigan again petitioned for certiorari but its petition was denied, *Michigan v. Booker*, 107 S.Ct. 910 (1987). This sequence would, of course, strongly suggest that the non-retroactivity of *Batson*, as determined in *Allen*, had no application to *Booker* (and by extension to *Teague*). Since the Sixth Circuit had decided that *Booker* prevailed on Sixth Amendment principles—an issue left undecided in *Batson*—its decision (entirely consistent with the result in *Batson*) was undisturbed either by *Batson* or by *Allen*. I will, therefore, because of *Allen* join battle on the merits on Sixth Amendment terrain. I will not rely directly on *Batson*'s equal protection analysis even though, as shown, Teague did not waive his right to assert an equal protection claim in this court.

I shall, however, take account of *Batson* to this very important (in fact critical) extent: The Supreme Court in *Batson* reweighed the costs of imposing inhibitions upon the exercise of the peremptory challenge and of additional administrative burdens on the courts in order to sustain constitutional values in every criminal jury trial.[3] *Batson*

[3] Thus, *Batson* says:

> The State contends that our holding will eviscerate the fair trial values served by the peremptory challenge. Conceding that the Constitution does not guarantee a right to peremptory challenges and that *Swain* did state that their use ultimately is subject to the strictures of equal protection, the State argues that the privilege of unfettered exercise of the challenge is of vital importance to the criminal justice system.
>
> *While we recognize, of course, that the peremptory challenge occupies an important position in our trial procedures, we do not agree that our decision today will undermine the contribution the challenge generally makes to the administration of justice.* The reality of practice, amply reflected in many state and federal court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors. By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges,

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was a policy judgment by the Court that these were costs which could and should be borne. 106 S.Ct. at 1724. If a like policy judgment becomes part of the Sixth Amendment analysis, the results of that analysis become dramatically more favorable to the defendant—even though his rights derive from a different amendment. The reweighing of costs against constitutional demands in *Batson* is a more than adequate response to the claimed inhibitions on the exercise of peremptory challenges and the administrative difficulties that the majority finds to be such decisive considerations. *Batson* completely demolishes the majority's arguments based on policy. In this respect, the majority opinion is little more than a compendium of outmoded views.

II.

In *Taylor v. Louisiana*, 419 U.S. 522 (1975), the Supreme Court held that the Sixth Amendment guaranteed that the jury pool from which juries are selected must be a representative cross-section of the community. At the time, Louisiana law required that no woman be selected for jury service unless she had previously filed a written declaration of her desire to serve on a jury; in

[3] *continued*

our decision enforces the mandate of equal protection and furthers the ends of justice. In view of the heterogeneous population of our nation, public respect for our criminal justice system and the rule of law will be strengthened if we ensure that no citizen is disqualified from jury service because of his race.

Nor are we persuaded by the State's suggestion that our holding will create serious administrative difficulties. In those states applying a version of the evidentiary standard we recognize today, courts have not experienced serious administrative burdens, and the peremptory challenge system has survived. We decline, however, to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges.

Batson, 106 S.Ct. at 1724 (emphasis supplied) (footnotes omitted).

the *Taylor* case itself, there was no woman on the venire from which the jury was drawn. Reviewing earlier cases, the Court said that "the American concept of the jury trial contemplates a jury drawn from a fair cross-section of the community." 419 U.S. at 527. It cited *Smith v. Texas*, 311 U.S. 128, 130 (1940), in which it had held that the exclusion of racial groups from jury service was " 'at war with our basic concepts of a democratic society and a representative government,' " 419 U.S. at 527, and went on to say:

> We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge . . . . This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool.

Id. at 530 (citation omitted).

As the majority correctly points out, this requirement of representativeness does not extend directly to the petit jury; no defendant has the right to a trial jury that reflects the make-up of the community. The majority opinion devotes many pages to establishing this point, though I must confess that I am at a loss to explain why. No one seems to quarrel with this proposition, least of all Teague. Appellant's Brief at 21.

Teague's position, which was adopted by the panel opinion and which even the majority here seems to endorse at one point in its opinion, *supra* p. 12, is that although there is no right to be tried by a representative petit jury, the Sixth Amendment guarantees the possibility that the jury selected will contain a representative cross-section

of the community. In *Williams v. Florida*, 399 U.S. 78 (1970), the Court held that a six-person jury was constitutionally acceptable; in *Ballew v. Georgia*, 435 U.S. 223 (1978), it held that a five-person jury was not. In each case the Court was guided by the need to draw a line that would preserve the possibility of a representative jury. In *Williams*, the Court indicated that a jury should be large enough "to promote group deliberation, free from outside attempts at intimidation, and to provide a *fair possibility for obtaining a representative cross-section* of the community." 399 U.S. at 100 (emphasis added). In *Ballew*, likewise, the Court expressed concern "about the *ability* of juries truly to represent the community as membership decreases below six," 435 at 242 (emphasis added), and held that "any further reduction . . . that prevents juries from truly representing their communities, attains constitutional significance," *id.* at 239. *See also id.* at 245 (White, J., concurring); *id.* at 246 (Brennan, J., concurring).

Thus, although the Sixth Amendment does not guarantee a representative trial jury, it does guarantee the possibility of a representative jury. It would be odd if the right to a representative jury pool did not reach, in some way or other, into the trial jury, that is, if the Sixth Amendment's reach ended with the first stage of jury selection. If the Sixth Amendment has implications for the jury pool, it can only be because it has some implication for the jury that actually sits at trial. As the Supreme Judicial Court of Massachusetts said in *Commonwealth v. Soares*, 387 N.E.2d 499, 513 (Mass.), *cert. denied*, 444 U.S. 881 (1979):

> It is not enough that there be a representative venire or panel. The desired interaction of a cross-section of the community does not occur there; it is only effectuated within the jury room itself.

Thus, it would be nonsensical if the Sixth Amendment's requirement of representativeness in the jury *pool* were not intended to have some sort of effect in the jury *room*.

If the Sixth Amendment does guarantee something about the trial jury, then, it can only be the *possibility* or *chance* that the various groups that make up a community will be represented on the jury, and that is the conclusion that the Supreme Court drew in *Williams*, 399 U.S. 78, and *Ballew*, 435 U.S. 223. The six-person jury is constitutionally acceptable because it is large enough to allow for the possibility that the jury will be representative; the five-person jury is not acceptable because it does not. The majority cites *Ballew* and *Williams* for the proposition that "merely decreasing the possibility of obtaining a fair cross section of the community on the petit jury does not violate the sixth amendment right to a trial by an impartial jury." *Supra* p. 21. The relevant question, however, is whether the possibility is decreased for a constitutionally permissible reason. Excluding jurors on the basis of race is not a constitutionally acceptable reason for reducing the possibility of a representative jury, and the majority makes no attempt to meet this argument. Race-based peremptory challenges obviously impact upon the *process* of jury selection in a way that reduces the statistical probability of a representative jury. *Fields v. Colorado*, 732 P.2d 1145, 1155 (Colo. Sup. Ct. 1987) ("The right to trial by an impartial jury does guarantee that the possibility of a petit jury in a given case representing a fair cross-section of the community will not be limited arbitrarily by the discriminatory and systematic use of peremptory challenges.").[4]

The majority asserts that in this case "the record is barren of any proof or testimony establishing community prejudice towards Teague." *Supra* p. 21. The crucial question, however, is not whether the particular jurors selected were prejudiced against Teague but whether the

[4] In *Fields* the Colorado Supreme Court held that a prosecutor's use of peremptory challenges to systematically exclude Spanish-surnamed veniremen from a jury deprives a defendant of his right to an impartial jury under the Sixth Amendment of the federal Constitution.

prosecution used its peremptory challenges to reduce the possibility that blacks would be sitting on the jury, and there is overwhelming evidence that the state did just that. The prosecution and the defense each had ten peremptory challenges. The state exercised every single one of its challenges to exclude a black venireman.[5] After the state had used six of its peremptory challenges and then again after it had used all ten of its challenges, the defense moved for a mistrial on the ground that the state was using its challenges only against black jurors. In responding to the second motion, the state explained that it had excused some of the veniremen because they were very young and that it had excused others because it was attempting to obtain an equal number of men and women. The state appellate court found the prosecution's explanation unpersuasive, 439 N.E.2d 1066, 1069-70, and after examining the manner in which the state exercised its peremptory challenges, I would agree that the state's proffered explanations were pretextual.[6]

[5] It is true that the defense used one of its challenges to excuse a black; however, the husband of that juror was a policeman and since Teague's trial involved the shooting of a policeman, that decision would seem to be justified on grounds apart from race.

[6] After its first challenge, every juror rejected by the state was a black woman. At that point, at which the only jurors seated were four males, the prosecution had already rejected five black women. It had also accepted three women, ultimately rejected by the defense. It is highly improbable, therefore, that in exercising its first six challenges the state was motivated to exclude women in order to achieve a balance of males and females. Of the next four jurors, all were female; the two whites were accepted by the state and seated; the two blacks were rejected by the state. By the time the tenth juror was seated, seven were male and only three female. Yet the state accepted two males, rejected by the defense, and rejected two black females. The last two women—giving the more or less balanced result of seven men and five women which the state points to in support of its explanation—were added after the state had exhausted its peremptories. In light of this pattern, the state's explanation that it sought to balance men and women is very unpersuasive.

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When members of a certain group can be excluded from service on a particular petit jury, the negative effect upon defendants who happen to belong to that group is not difficult to imagine; and it will be especially severe where the group suffers from community prejudice. In such circumstances, the defendant may not even have the protection of the prosecutor's usual concern to bring only well-supported cases into court, for the prosecutor will know that the defendant's group will not be represented and that he can count to some extent upon the prejudice of the community. The protection provided by the Sixth Amendment lies in the general requirement that the state cannot interfere with the possibility that the jury will be representative. And it is that requirement that explains the need for the jury pool to be actually representative, which would otherwise be a great mystery. And it is that requirement which demands a process of getting from the jury pool to the trial jury which does not affect unjustifiably the statistical probability of any group's being represented.

Further, in a case of this sort the perception is almost as important as the reality. Knowledge that blacks could be excluded at will by prosecutors trying black defendants, for example, would lead to cynicism among blacks in viewing the jury system. The importance of general confidence in the accuracy and reliability of the penal system—confidence that the guilty tend to be convicted and the innocent tend to be acquitted—should not be underestimated; such confidence is crucial to the deterrent effect punishment must have. We do not increase general respect for the law by simply making it easier to get con-

[6] *continued*

The state also claimed to be excluding jurors of "very young years." The state rejected four jurors who were college or business school students, or recent graduates; all were black women. The systematic exclusion of younger jurors is perhaps as pernicious as the exclusion of blacks; but in any case, this rationale cannot by itself explain the state's action.

victions; and we cannot increase the respect a certain group has for the law by simply making it easier to convict members of that group. There must be the accompanying perception that the law operates with some precision, tending to convict all those and only those who are guilty. In the extreme case, the law would convict members of a group arbitrarily or at random; and of course in that case punishment would have no effect at all. But if members of a group that suffers from prejudice can be tried before juries from which fellow group members have been excluded, to some extent convictions may be perceived as attributable to prejudice against the group and therefore arbitrary. To the extent that they are so perceived, the purpose of punishment is defeated.[7]

[7] A shocking number of defendants [in Illinois had] alleged [as of 1983] that prosecutors used peremptory challenges to exclude black people from the juries that convicted them:

People v. Payne (1983), 99 Ill. 2d 135, 75 Ill. Dec. 643, 457 N.E.2d 1202; *People v. Yates* (1983), 98 Ill. 2d 502 at 540, 75 Ill. Dec. 188, 456 N.E.2d 1369 (Simon, J., dissenting); *People v. Cobb* (1983), 97 Ill. 2d 465, 74 Ill. Dec. 1, 455 N.E.2d 31; *People v. Williams* (1983), 97 Ill. 2d 252, 73 Ill. Dec. 360, 454 N.E.2d 220; *People v. Bonilla* (1983), 117 Ill. App. 3d 1041, 73 Ill. Dec. 187, 453 N.E.2d 1322; *People v. Gosberry* (1983), 93 Ill. 2d 544, 70 Ill. Dec. 468, 449 N.E.2d 815; *People v. Davis* (1983), 95 Ill. 2d 1, 69 Ill. Dec. 136, 447 N.E.2d 353; *People v. Gilliard* (1983), 112 Ill. App. 3d 799, 68 Ill. Dec. 440, 445 N.E.2d 1293; *People v. Newsome* (1982), 110 Ill. App. 3d 1043, 66 Ill. Dec. 708, 443 N.E.2d 634; *People v. Turner* (1982), 110 Ill. App. 3d 519, 66 Ill. Dec. 211, 442 N.E.2d 637; *People v. Teague* (1982), 108 Ill. App. 3d 891, 64 Ill. Dec. 401, 439 N.E.2d 1066; *People v. Belton* (1982), 105 Ill. App. 3d 10, 60 Ill. Dec. 881, 433 N.E.2d 1119; *People v. Dixon* (1982), 105 Ill. App. 3d 340, 61 Ill. Dec. 216, 434 N.E.2d 369; *People v. Gaines* (1981), 88 Ill. 2d 342, 58 Ill. Dec. 796, 430 N.E.2d 1046; *People v. Mims* (1981), 103 Ill. App. 3d 673, 59 Ill. Dec. 369, 431 N.E.2d 1126; *People v. Lavinder* (1981), 102 Ill. App. 3d 662, 58 Ill. Dec. 301, 430 N.E.2d 243; *People v. Clearlee* (1981), 101 Ill. App. 3d 16, 56 Ill. Dec. 600, 427

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I think it is beyond dispute, therefore, that although the Sixth Amendment does not give the defendant the right to a representative trial jury, it assures him of the possibility that his jury will contain members of the various groups in his community, a possibility that cannot be impaired by the exercise of peremptory challenges based solely on the race of the prospective juror.

[7] *continued*

N.E.2d 1005; *People v. Vaughn* (1981), 100 Ill. App. 3d 1082, 56 Ill. Dec. 508, 427 N.E.2d 840; *People v. Tucker* (1981), 99 Ill. App. 3d 606, 54 Ill. Dec. 646, 425 N.E.2d 511; *People v. Allen* (1981), 96 Ill. App. 3d 871, 52 Ill. Dec. 419, 422 N.E.2d 100; *People v. Bracey* (1981), 93 Ill. App. 3d 864, 49 Ill. Dec. 202, 417 N.E.2d 1029; *People v. Smith* (1980), 91 Ill. App. 3d 523, 47 Ill. Dec. 1, 414 N.E.2d 1117; *People v. Fleming* (1980), 91 Ill. App. 3d 99, 46 Ill. Dec. 217, 413 N.E.2d 1330; *People v. Attaway* (1976), 41 Ill. App. 3d 837, 354 N.E.2d 448; *People v. Thornhill* (1975), 31 Ill. App. 3d 779, 333 N.E.2d 8; *People v. King* (1973), 54 Ill. 2d 291, 296 N.E.2d 731; *People v. Petty* (1972), 3 Ill. App. 3d 951, 279 N.E.2d 509; *People v. Fort* (1971), 133 Ill. App. 2d 473, 273 N.E.2d 439; *People v. Butler* (1970), 46 Ill. 2d 162, 263 N.E.2d 89; *People v. Cross* (1968), 40 Ill. 2d 85, 237 N.E.2d 437; *People v. Dukes* (1960), 19 Ill. 2d 532, 169 N.E.2d 84; *People v. Harris* (1959), 17 Ill. 2d 446, 161 N.E.2d 809.

People v. Payne, 99 Ill. 2d 135, 152-53, 457 N.E.2d 1202, 1210-11 (1983) (Simon, J., dissenting).

> [I]t is an open secret that prosecutors in Chicago and elsewhere have been using their peremptory challenges to systematically eliminate all blacks, or all but token blacks, from juries in criminal cases where the defendants are blacks.

People v. Gilliard, 112 Ill. App. 3d 799, 807, 445 N.E.2d 1293, 1299 (1983) (footnote omitted), *rev'd*, 96 Ill. 2d 544, 454 N.E.2d 330 (1983).

This problem is not unique to Illinois. After the Supreme Court decided *Griffith v. Kentucky*, 107 S.Ct. 708 (1987), which held that *Batson* would be applied retroactively to cases pending on direct state or federal review when *Batson* was decided, the Court granted certiorari in 24 cases from various jurisdictions in which a *Batson* claim was raised, vacated the judgment in each case and remanded for reconsideration in light of *Griffith*.

The majority does not really address why it believes that the exercise of peremptory challenges solely on the basis of a juror's race does not violate the Sixth Amendment. Instead, it seems to rest its opinion on the practical problems involved in restricting the exercise of peremptory challenges. I do not disagree that the peremptory challenge is itself an important guarantor of an impartial jury. The peremptory challenge allows each side to eliminate jurors it suspects, for reasons it cannot articulate or for reasons that do not reach the level of cause, of being partial to the other side. Where challenges are used in that way, the resulting jury should be closer to the ideal of a body without sympathies for either side. Since the selection of juries from the master roll is more or less random, the problem of one-sided sympathies in a group drawn for service on a particular day is not far-fetched. Hence, the peremptory challenge has an important function, along with the challenge for cause, in our rough-and-ready system for arriving at impartiality. The problem I find with the majority opinion is that the Supreme Court in *Batson* has already rejected the argument that the exercise of peremptory challenges cannot be policed without destroying the effectiveness of the challenges. The majority is thus pursuing a contention that is unrelated to any particular constitutional doctrine and which has been thoroughly discredited by the Supreme Court in *Batson*.

I agree with the majority that the problems of maintaining the effectiveness of the peremptory challenge and of relieving the administrative burden on courts are the considerations which led the Court for many years to cling to *Swain*. The Court has now decided, however, that the effectiveness and credibility of the criminal justice system is at stake and these problems which traditionally aroused concern must simply be accepted and solved. This momentous policy decision by the Supreme Court opens the way just as much to reconsideration of the issues under the Sixth Amendment as under the equal protection clause. The "practical" arguments of the majority have already

been answered by the highest judicial authority, and I should think they would be considered anachronisms rather than a source of guidance to this court in the post-*Batson* era.

For the foregoing reasons, I respectfully dissent.

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APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

UNITED STATES OF AMERICA ex rel. FRANK DEAN TEAGUE, Petitioner,	)	
v.	)	No. 84 C 1934
MICHAEL LANE, Director, Department of Corrections, and MICHAEL O'LEARY, Warden, Stateville Correctional Center, Respondents.	)	

O R D E R

Petitioner Frank Dean Teague seeks habeas corpus relief from his present incarceration at the Stateville Correctional Center, arguing that his conviction by an all white jury in the Circuit Court of Cook County, Illinois violated the Sixth and Fourteenth Amendments because the prosecution used all ten of its peremptory challenges to exclude prospective black jurors. Teague does not allege that the Cook County State's Attorney systematically excludes prospective black jurors from all criminal cases involving black defendants. Relying upon Swain v. Alabama, 380 U.S. 202 (1965) (use of peremptory challenges to exclude blacks from service in an individual case is not a denial of equal protection absent systematic exclusion), the respondent has moved for summary judgment.

Teague maintains that the Supreme Court has invited a reevaluation of Swain. See McCray v. New York, ___ U.S. ___, 103 S. Ct. 2438 (1983) (Stevens, Blackmun and Powell, J.J., concurring). In light of holdings of the Supreme Courts of

Massachusetts and California that the use of peremptory challenges to exclude prospective black jurors violates their state constitutional guarantees of an impartial jury, see Commonwealth v. Soares, 377 Mass. 593, 387 N.E.2d 499, cert. denied, 444 U.S. 981 (1979) and People v. Wheeler, 222 Cal.3d 258, 583 F.2d 748 (1978), Teague asks this Court to view Swain as noncontrolling.

Teague argues persuasively, and were this Court writing on a clean slate, it might be inclined to adopt the reasoning he advances. However, the issue is foreclosed by Swain and the Seventh Circuit's recent decisions in United States v. Clark, No. 82-1813 (7th Cir. June 20, 1984) and United States ex rel. Palmer v. DeRobertis, No. 83-1148 (7th Cir. May 14, 1984). This Court is not free to reject the holding of the Court in Clark, as petitioner requests. Since this Court sits "on the shores of Lake Michigan rather than the banks of the Potomac," Vail v. Board of Education of Paris Union, 706 F.2d 1435, 1445 (7th Cir. 1983) (Eschbach, J., concurring), the decisions in Clark and Palmer are controlling.

IT IS THEREFORE ORDERED that respondents' motion for summary judgment is granted. The petition for a writ of habeas corpus is denied.

ENTER:

William T. Hart
UNITED STATES DISTRICT JUDGE

Dated: August 8, 1984

ORIGINAL

No. 87-5259

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

FRANK DEAN TEAGUE,

Petitioner,

vs.

MICHAEL LANE, Director, Department of Corrections and MICHAEL O'LEARY, Warden

Respondents.

CERTIFICATE OF SERVICE AND STATEMENT OF TIMELY FILING

I, TERENCE M. MADSEN, a member of the bar of this Court and representing Respondent in this cause, certify:

1.) That I have served ten (10) copies of the Respondent's Brief In Opposition on the below-named party, by depositing such copy in the United States mail at 100 West Randolph Street, Chicago, Illinois, with the proper postage affixed thereto, and with the envelope addressed as follows:

Joseph Spaniol, Clerk
United States Supreme Court
Supreme Court Building
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2.) That all parties required to be served have been served, to wit:

Patricia Unsinn
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I further state that this mailing took place on August 26, 1987, and within the time permitted for filing a brief in opposition to a petition for a writ of certiorari.

BY: _____
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SUBSCRIBED and SWORN to
before me this 26th day of
August, 1987.

_____
NOTARY PUBLIC

No. 87-5259

IN THE
SUPREME COURT OF THE UNITED STATES

October Term, 1986

FRANK DEAN TEAGUE,

Petitioner,

vs.

MICHAEL LANE, Director, Department of Corrections and MICHAEL O'LEARY, Warden

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For the Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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QUESTIONS PRESENTED FOR REVIEW

1. Whether petitioner's sixth and fourteenth amendment rights to a jury drawm from a fair cross-section of the community requires an examination of the prosecutor's use of his peremptory challenges in the selection of a petit jury.
2. Whether the decision in Batson v. Kentucky controls in that this case was final to the date of the decision in Batson.
3. Whether petitioner's failure to raise a claim in state court premised upon the decision in Swain v. Alabama precludes review of the claim.

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Respondents.

OPINION BELOW

The opinion of the United States Court of Appeals for the Seventh Circuit is reported at Teague v. Lane, 820 F.2d 832 (7th Cir. 1987) (en banc). The opinion has been submitted to this Court as Appendix C to the Petition for Writ of Certiorari, and, therefore, is not contained in this Brief in Opposition.

JURISDICTION

The jurisdiction of this Court is properly invoked under 28 U.S.C. § 1254(1).

STATEMENT OF THE CASE

Petitioner, Frank Dean Teague, was convicted of three counts of attempt murder, and two counts of armed robbery following a jury trial in the Circuit Court of Cook County, Illinois. Petitioner was sentenced to concurrent terms of imprisonment of 30 years on each count.

Petitioner appealed his convictions to the Illinois Appellate Court and claimed, inter alia, that due process and the right of petitioner to a trial by a fair and impartial jury were violated by the State utilizing its peremptory challenges to exclude black veniremen. The court affirmed the convictions. People v. Teague, 108 Ill. App. 3d 891, 439

N.E.2d 1066 (1st Dist. 1982). A petition for leave to appeal was denied by the Illinois Supreme Court. People v. Teague, 93 Ill.2d 547, 449 N.E.2d 820 (1983). This Court denied a petition for writ of certiorari. Teague v. Illinois, 464 U.S. 867 (1983).

Subsequently, petitioner filed an application for a writ of habeas corpus in the United States District Court for the Northern District of Illinois, Eastern Division. Petitioner claimed that his Sixth and Fourteenth Amendment rights were violated when the prosecutor used his peremptory challenges to exclude black veniremen. The district court denied petitioner habeas corpus relief.

Petitioner appealed to the United States Court of Appeals for the Seventh Circuit and claimed that this Court's decision in Swain v. Alabama, 380 U.S. 202 (1965) be re-examined. On April 9, 1985 the case was argued before a panel of the court. Pursuant to Circuit Rule 16(e) the panel opinion was circulated to the judges of the court and a majority of the judges voted to rehear the case en banc. United States ex rel. Teague v. Lane, 779 F.2d 1332 (7th Cir. 1985). The rehearing en banc was postponed until this Court announced its decision in Batson v. Kentucky, ___ U.S. ___, 106 S.Ct. 1712 (1986), which was pending before this Court when the vote was taken to rehear the case en banc. Following rehearing of the case en banc, the court affirmed the denial of a writ of habeas corpus and held: (1) Allen v. Hardy, ___ U.S. ___, 106 S.Ct. 2878 (1986) precluded retroactive application of the decision in Batson; (2) even assuming the claim made pursuant to Swain v. Alabama was not procedurally defaulted by Wainwright v. Sykes, 433 U.S. 72 (1977), petitioner did not make a sufficient showing of an equal protection violation; and (3) the Sixth Amendment fair cross-section requirement was inapplicable to the petit jury. Teague v. Lane, 820 F.2d 832 (7th Cir. 1987) (en banc). Petitioner now seeks to have this Court review the decision of the Seventh Circuit.

REASONS FOR DENYING THE PETITION FOR WRIT OF CERTIORARI

The respondents respectfully request this Court to deny the Petition for Writ of Certiorari to review the decision of the United States Court of Appeals for the Seventh Circuit.

I.

PETITIONER'S SIXTH AND FOURTEENTH AMENDMENT RIGHTS TO A JURY DRAWN FROM A FAIR CROSS-SECTION OF THE COMMUNITY DOES NOT REQUIRE AN EXAMINATION OF THE PROSECUTOR'S USE OF HIS PEREMPTORY CHALLENGES IN THE SELECTION OF A PETIT JURY.

Initially, petitioner contends that "the prosecutor's racially discriminatory use of its [peremptory] challenges violated his Sixth Amendment right to be tried by a jury drawn from a fair cross-section of the community." (Petition for Writ of Certiorari at 6) The court below held that insofar as "the sixth amendment requires only that a jury be impartial, we refuse to extend the fair cross-section requirement to require that the petit jury trying a criminal defendant reflect a fair cross-section of the community wherein the trial takes place." Teague v. Lane, 820 F.2d 832 (1987). Respondents maintain the court below properly reviewed and correctly decided the issue where the Court relied on decisional law of this Court.

In Taylor v. Louisiana, 419 U.S. 522 (1975), this Court recognized the principle that the sixth amendment requires trial by a jury drawn from a fair cross-section of the community. However, this Court did note that "[i]t should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the community and thereby fail to be reasonably representative thereof." Id. at 538. In view of this specific language it is apparent that the sixth amendment does not control the process of selecting a petit jury and can impose no requirements on a prosecutor's exercise of his peremptory challenges.

Moreover, most recently in Lockhart v. McCree, ___ U.S. ___, 106 S.Ct. 1758 (1986), this Court held that the "fair cross-section" requirement did not prevent trial before a "death-qualified" jury. Specifically, this Court remarked, "[w]e have never invoked the fair cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large." Id. at ___, 106 S.Ct. at 1764. A reasonable reading of Lockhart suggests that this Court need not examine the issue with respect to the fair cross-section requirement and a prosecutor's exercise of his peremptory challenges.

The court below in its opinion made clear that its decision was controlled by and did not depart from decisions of this Court:

> Contrary to Teague's assertion that the Supreme Court decisions in Williams [v. Florida, 399 U.S. 78 (1970)] and Apodoca v. Oregon, 406 U.S. 404 (1972), require us to apply the fair cross-section requirement to the petit jury, those decisions, as well as the decisions in Ballew [v. Georgia, 435 U.S. 223 (1978)] and Burch v. Louisiana, 441 U.S. 130 (1979), require only that the jury selection process provide for the "possibility" that the jury empanelled reflect a fair cross-section of the community. The decisions of the Supreme Court make clear that absent a pattern of systematic exclusion of a particular class from the petit jury, no constitutional wrong has occurred.

Teague v. Lane, 820 F.2d 832, 838 (7th Cir. 1987) (en banc). Where the court below fully addressed and correctly decided petitioner's claim, this Court should refuse to grant petitioner's request for a writ of certiorari.

II.

THE DECISION IN BATSON v. KENTUCKY DOES NOT CONTROL IN THAT THIS CASE WAS FINAL PRIOR TO THE DATE OF THE DECISION IN BATSON.

Petitioner also claims that this Court's decision in Batson v. Kentucky, ___ U.S. ___, 106 S.Ct. 1712 (1986) should be

applied retroactively to his conviction which was not final at the time the petition for a writ of certiorari was denied in McCray v. New York, 461 U.S. 961 (1983). (Petition for Writ of Certiorari at 8) Respondents submit petitioner's application for a writ of certiorari with respect to this claim should be denied in that this Court's decision in Allen v. Hardy, ___ U.S. ___, 106 S.Ct. 2878 (1986) precludes the retroactive application of the Batson decision to this case.

In Allen v. Hardy, decided June 30, 1986, just two months after the decision in Batson, this Court held that Batson did not apply "retroactively on collateral review of convictions that become final before our opinion [in Batson] was announced." Allen v. Hardy, ___ U.S. ___, ___, 106 S.Ct. 2878, 2880 (1986). This Court further explained the scope of its decision by stating:

> By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for certiorari had elapsed before our decision in Batson v. Kentucky.

Id. at 2880 n. 1.

In the case at bar, petitioner's conviction was affirmed by the Illinois Appellate Court on August 30, 1982. People v. Teague, 108 Ill. App. 3d 891, 439 N.E.2d 1066 (1st Dist. 1982). The Illinois Supreme Court denied leave to appeal on April 21, 1983. People v. Teague, 93 Ill.2d 547, 449 N.E.2d 820 (1983). This Court subsequently denied his petition for a writ of certiorari on October 3, 1983. Teague v. Illinois, 464 U.S. 867 (1987). Thus, petitioner's case was final at the time this Court announced its decision in Batson, on April 30, 1986. Respondents maintain that Allen v. Hardy resolves the issue, and this Court need not reexamine its very recent decision.

III.

PETITIONER'S FAILURE TO RAISE A CLAIM IN STATE COURT PREMISED UPON THE DECISION IN SWAIN v. ALABAMA, PRECLUDES REVIEW OF THE CLAIM.

Finally, petitioner argues that "he is entitled to relief from his conviction because the record establishes an equal protection violation pursuant to Swain v. Alabama, 380 U.S. 202 (1965)." (Petition for Writ of Certiorari at 11) Respondents maintain this Court should deny the petition for writ of certiorari as to this claim where petitioner did not raise a Swain claim in the state court, and therefore, he was procedurally barred from advancing the claim by way of a petition for writ of habeas corpus pursuant to Wainwright v. Sykes, 433 U.S. 72 (1977).

Moreover, the substance of petitioner's claim is without merit. Petitioner did not claim below in state court or in the district court that the prosecution had engaged in the systematic exclusion of blacks from petit juries in case after case. Thus, petitioner failed to advance the issue under the analysis articulated by this Court in Swain.

CONCLUSION

In view of the foregoing reasons, respondents respectfully request this Court to deny the petition for a writ of certiorari.

Respectfully submitted,

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REPLY TO BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

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Respondents.

REPLY TO BRIEF IN OPPOSITION
TO PETITION FOR WRIT OF CERTIORARI

REASONS FOR GRANTING WRIT

Petitioner responds as follows to the arguments of Respondents:

WHETHER THE SIXTH AMENDMENT FAIR CROSS-SECTION REQUIREMENT EXTENDS TO THE PETIT JURY SO AS TO BAR THE RACIALLY DISCRIMINATORY USE OF THE PEREMPTORY CHALLENGE IS A RECURRING QUESTION ON WHICH THIS COURT EXPRESSED NO VIEW IN BATSON BUT WHICH REMAINS CONTROVERSIAL, RESULTING IN CONFLICTING DECISIONS FROM BOTH STATE AND FEDERAL COURTS, THUS MERITING THIS COURT'S REVIEW.

Respondents urge that this Court need not examine this issue because in both Taylor v. Louisiana, 419 U.S. 522 (1975) and Lockhart v. McCree, 106 S.Ct. 1758 (1986) it rejected the notion that the Sixth Amendment requires that a jury reflect the composition of the community. There are two defects to this argument. First, regardless of this merit of the argument, courts of appeal have reached conflicting decisions as to this contention, and the existence of these diverging opinions alone demands that this Court grant certiorari to resolve the conflict. Second, Petitioner has never demanded that the jury which decides his guilt or innocence mirror the community, only that the prosecution be barred from exercising its challenges so as to preclude the possibility of obtaining a representative jury.

This Court has interpreted the Sixth Amendment to guarantee the fair possibility of a representative jury, Ballew v. Georgia, 435 U.S. 223 (1978), and Petitioner has contended only that a prosecution's racially discriminatory use of the peremptory challenge interferes with the possibility that the jury will reflect a fair cross section of the community. Therefore, this Court has not yet expressly rejected Petitioner's argument on its merits.

BATSON SHOULD BE APPLIED RETROACTIVELY TO ALL CONVICTIONS NOT FINAL AT THE TIME CERTIORARI WAS DENIED IN McCRAY V. NEW YORK IN ORDER TO CORRECT THE INEQUITY AND CONFUSION WHICH RESULTED WHEN THIS COURT, WHILE SIGNALING THAT SWAIN WAS NO LONGER DISPOSITIVE, INTENTIONALLY DELAYED A DECISION ON THE ISSUE RESOLVED BY BATSON.

The flaw in Respondents' argument that Allen v. Hardy, 106 S.Ct. 2878 (1986) controls the resolution of the question of the retroactivity of Batson v. Kentucky, 106 S.Ct. 1712 (1986) to this case is that the direct appeal in Allen v. Hardy was final at the time this Court denied certiorari in McCray v. New York, 461 U.S. 961 (1983). Therefore this Court was not faced with the issue presented herein when it decided Allen v. Hardy. Granting certiorari in this case would allow this Court to finally conclude its rethinking of the law of retroactivity, a desire expressed by the two members of the Court in separate opinions in Griffith v. Kentucky, 107 S.Ct. 708 (1987) (Powell, J., concurring, and Rehnquist, C.J., dissenting).

THE DIRECT CONFLICT BETWEEN THE DECISIONS OF THE EIGHTH AND NINTH CIRCUIT COURTS OF APPEALS AND THE SEVENTH CIRCUIT COURT OF APPEALS REGARDING WHETHER AN EQUAL PROTECTION VIOLATION MAY BE PROVEN PURSUANT TO SWAIN V. ALABAMA OTHER THAN BY PROOF OF A SYSTEMATIC EXCLUSION

OF BLACK JURORS BY PEREMPTORY CHALLENGE IN CASE AFTER CASE, A QUESTION LEFT OPEN BY SWAIN, SHOULD BE RESOLVED BY THIS COURT.

Respondents assert Petitioner has made no claim cognizable pursuant to Swain v. Alabama, 380 U.S. 202 (1965) because he has not alleged the prosecution "engaged in the systematic exclusion of blacks from petit juries in case after case." (Response, p. 6) Respondents mistakenly assume a Swain violation may be established only by a showing of invariable exclusion of black jurors in more than one case, an assumption for which it offers no support of authority. The Swain opinion contains no such limitation, as the author of that opinion recognized, Batson v. Kentucky, 106 S.Ct. 1712, 1725 n.* (White, J., concurring), and the Ninth and Eighth Circuit Courts of Appeals have so held. Weathersby v. Morris, 708 F.2d 1493 (9th Cir. 1983); Garrett v. Morris, 815 F.2d 509 (8th Cir. 1987). The fact that the Swain argument was not raised in the state court does not bar relief for Petitioner since Respondents do not deny that the state courts denied Petitioner relief on the ground that Swain controlled, thus rejecting the claim on its merits. Ulster County Court v. Allen, 442 U.S. 140 (1979).

Respectfully submitted,

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FRANK DEAN TEAGUE,
Petitioner,

v.

MICHAEL LANE,
Director, Department Of Corrections, *et al.*,
Respondents.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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JOINT APPENDIX

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PETITION FOR WRIT OF CERTIORARI FILED AUGUST 10, 1987
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CHRONOLOGICAL LIST OF RELEVANT DOCKET ENTRIES

March 16, 1977—Information filed in the Circuit Court of Cook County charging Frank Teague with four counts of attempt murder, three counts of aggravated battery and two counts of armed robbery.

August 6, 1979—Jury selection proceedings conducted on the information.

November 21, 1979—Teague was sentenced to concurrent terms of imprisonment of 30 years on three counts of attempt murder and two counts of armed robbery.

August 30, 1982—Opinion of the Appellate Court of Illinois, affirming Teague's conviction and sentence filed, Campbell, J., dissenting.

April 21, 1983—Petition for Leave to Appeal to the Illinois Supreme Court is denied, Simon, J., dissenting.

October 3, 1983—Petition for Writ of Certiorari denied. Justice Brennan and Justice Marshall would grant certiorari.

March 5, 1984—Petition for Writ of Habeas Corpus filed in the United States District Court, Northern District of Illinois.

May 24, 1984—Respondents' Answer and Motion for Summary Judgment filed.

June 22, 1984—Petitioner's Cross-motion for Summary Judgment and Response to Respondents' Motion filed.

July 9, 1984—Response to Petitioner's Motion filed.

August 14, 1984—Order of District Court granting Respondent's Motion for Summary Judgment is entered.

August 16, 1984—Petitioner's request for a certificate of probable cause is granted.

December 30, 1985—Rehearing en banc ordered after circulation of panel opinion pursuant to Circuit Rule 16(e).

May 11, 1987—Opinion of en banc Court of Appeals for the Seventh Circuit filed.

IN THE
CIRCUIT COURT OF COOK COUNTY, ILLINOIS
COUNTY DEPARTMENT, CRIMINAL DIVISION

Information No. 77-40122

PEOPLE OF THE STATE OF ILLINOIS,
Plaintiff,

vs.

FRANK DEAN TEAGUE,
Defendant.

REPORT OF PROCEEDINGS

August 6, 1979

* * * *

[97] MR. MOTTA: Yes, your Honor. At this time I would move the Court for a mistrial. Your Honor, I believe that the Court can reflect back and note that six jurors have been excused by the State and I believe each of those jurors was black.

I don't see, and could not understand any other reason to excuse those jurors. I don't feei that it's fair tactic to use in a trial and on that basis I want to note my objection for the record and move the Court to mistry, that we may again resume with a new venire and select a jury.

THE COURT: All right, I will deny your motion, counsel.

MR. MOTTA: Your Honor, is the Court then condoning the State's—

THE COURT: No, counsel. I just say at this time it's improper, and I notice also that you have eliminated one black juror yourself.

MR. MOTTA: That's correct. Her husband was a police officer.

THE COURT: If I would have been the defendant I would have kept her.

MR. MOTTA: Her husband was a police officer and with all due respect, your Honor are not the defendant [98] but I would ask the Court to rule on whether or not the State's tactics—

THE COURT: I will merely deny your motion at this time, counsel. We are only halfway through your challenges.

(Recess taken)

* * * *

[177] MR. MOTTA: I also have a motion at this particular time, Judge, and I would ask—

THE COURT: All the jurors having left the courtroom and we are here alone with the defendant, and counsel, you have a motion. Go ahead.

MR. MOTTA: As the Court is aware State exercised 10 peremptory challenges and each challenge excused a black person. I feel that my client is entitled to a jury of his peers, your Honor. I feel that he is being denied this. I would ask the Court for a mistrial.

MR. ANGAROLA: We exercised more than 10 challenges. In fact we exercised 11 challenges and didn't just excuse black individuals. Counsel is incorrect when he stats that.

In fact, your Honor, one of the challenges, peremptory challenges exercised was against a white woman. In addition, your Honor, numerous individuals that were excused were of very young years. There was an attempt, your Honor, to have a balance of an equal number of men and women as the jury is now comprised there are seven men and five women sitting on the jury.

We feel that counsel's motion is totally improper.

[178] MR. MOTTA: If I may respond to that briefly, your Honor, State exercised 10 peremptory challenges,

all of 10 black people were excused; that their one peremptory challenge for an alternate juror excused, I believe, a white woman. I think the record will reflect the ages and background of the individuals that were excused. They were all to sit on the regular jury. I am not talking about the alternate, the one white alternate that was excused by the State.

MR. ANGAROLA: As your Honor previously pointed out, counsel himself excluded a black, Mrs. McCleary, your Honor, who was a black individual who was accepted by the People, and he excused her.

THE COURT: Counsel, I feel that it would appear that the jury appears to be a fair jury. I will deny your motion.

(A continuance was taken to Wednesday, August 8, 1979, at 10:00 o'clock a.m.)

* * * *

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF ILLINOIS
EASTERN DIVISION

No. 84 C 1934

UNITED STATES OF AMERICA ex rel.
FRANK DEAN TEAGUE,
Petitioner,

v.

MICHAEL LANE, Director, Department of Corrections, and
MICHAEL O'LEARY, Warden,
Stateville Correctional Center,
Respondents.

ORDER

Petitioner Frank Dean Teague seeks *habeas corpus* relief from his present incarceration at the Stateville Correctional Center, arguing that his conviction by an all white jury in the Circuit Court of Cook County, Illinois violated the Sixth and Fourteenth Amendments because the prosecution used all ten of its peremptory challenges to exclude prospective black jurors. Teague does not allege that the Cook County State's Attorney systematically excludes prospective black jurors from all criminal cases involving black defendants. Relying upon *Swain v. Alabama*, 380 U.S. 202 (1965) (use of peremptory challenges to exclude blacks from service in an individual case is not a denial of equal protection absent systematic exclusion), the respondent has moved for summary judgment.

Teague maintains that the Supreme Court has invited a reevaluation of *Swain*. *See McCray v. New York*, —— U.S. ——, 103 S. Ct. 2438 (1983) (Stevens, Blackmun

and Powell, J.J., concurring). In light of holdings of the Supreme Courts of Massachusetts and California that the use of peremptory challenges to exclude prospective black jurors violates their state constitutional guarantees of an impartial jury, *see Commonwealth v. Soares*, 377 Mass. 593, 387 N.E.2d 499, *cert. denied*, 444 U.S. 981 (1979) and *People v. Wheeler*, 222 Cal.3d 258, 583 F.2d 748 (1978), Teague asks this Court to view *Swain* as noncontrolling.

Teague argues persuasively, and were this Court writing on a clean slate, it might be inclined to adopt the reasoning he advances. However, the issue is foreclosed by *Swain* and the Seventh Circuit's recent decisions in *United States v. Clark*, No. 82-1813 (7th Cir. June 20, 1984) and *United States ex rel. Palmer v. DeRobertis*, No. 83-1148 (7th Cir. May 14, 1984). This Court is not free to reject the holding of the Court in *Clark*, as petitioner requests. Since this Court sits "on the shores of Lake Michigan rather than the banks of the Potomac," *Vail v. Board of Education of Paris Union*, 706 F.2d 1435, 1445 (7th Cir. 1983) (Eschbach, J., concurring), the decisions in *Clark* and *Palmer* are controlling.

IT IS THEREFORE ORDERED that respondents' motion for summary judgment is granted. The petition for a writ of *habeas corpus* is denied.

ENTER:

/s/ William T. Hart
United States District Judge

Dated: August 8, 1984

UNITED STATES COURT OF APPEALS
SEVENTH CIRCUIT

No. 84-2474

UNITED STATES OF AMERICA, EX REL.
FRANK TEAGUE,
Petitioner-Appellant,

v.

MICHAEL P. LANE, Director,
Department of Corrections and
MICHAEL O'LEARY, Warden,
Stateville Correctional Center,
Respondents-Appellees.

Dec. 30, 1985

Before CUMMINGS, Chief Judge, and BAUER, WOOD, CUDAHY, POSNER, COFFEY, FLAUM, EASTERBROOK, and RIPPLE, Circuit Judges.

ORDER

This case was argued on April 9, 1985 to a panel consisting of Judges Cudahy and Coffey, together with Senior Circuit Judge John W. Peck of the Sixth Circuit, sitting by designation.

Pursuant to Circuit Rule 16(e), the panel opinion in this case was circulated to all the judges of the court in regular active service. A majority of the judges in regular active service have voted to rehear this case *en banc*,

the time of argument to be set at a date convenient to the court.

CUDAHY, Circuit Judge, dissenting.

This case involves the question whether the Constitution prohibits prosecutors from using their peremptory challenges to exclude potential jurors exclusively on the basis of race. The matter was originally heard by a panel consisting of Judge Coffey, Senior Circuit Judge John W. Peck of the Sixth Circuit, sitting by designation, and me. The panel opinion, which I wrote, vacated and remanded on the grounds that the exercise of peremptory challenge by the prosecutor in this case violated, at least prima facie, the defendant's Sixth Amendment right of an impartial jury. The panel opinion, together with a dissent by Judge Coffey, was then circulated under our Circuit Rule 16 to the full court, which voted to rehear the matter *en banc*. I shall briefly outline here the essential content of the opinion of the panel majority to indicate why I believe that *en banc* review is unnecessary. Judge Peck has requested that I record his agreement with the views which follow.

Frank Teague, a black, was tried before a jury in an Illinois court and convicted of attempted murder and armed robbery. Each side had ten peremptory challenges and the state exercised all of its challenges to exclude black jurors. The defense also challenged one black, and there were no blacks on the resulting jury.

The defense moved for a mistrial, arguing that the state was denying Teague a trial by a jury of his peers by excluding potential jurors on the basis of race. These motions were denied. . lthough, as things now stand, a prosecutor need not defend his peremptory challenges, the state offered two rationales for its actions: that it was attempting to obtain a balance of men and women on the jury and that it had excused a number of young people. The Illinois Appellate Court noted that the record did not support the state's explanation but held that

under existing law it could place no restriction on a prosecutor's use of his peremptory challenges.

The precise issue raised was whether a defendant's Sixth Amendment rights are violated when a prosecutor uses his peremptory challenges to exclude members of one race from a petit jury. Such a use is not a violation of the Equal Protection Clause of the Fourteenth Amendment, so long as the exclusion does not prevent members of a race from *ever* sitting on juries, "in case after case, whatever the circumstances, whatever the crime, and whoever the defendant or victim may be." *Swain v. Alabama*, 380 U.S. 202, 223, 85 S.Ct. 824, 837, 13 L.Ed 2d 759 (1965). *Swain* was clearly decided on equa! protection grounds and, although the Court did not question the standing of the defendant Swain, the rights asserted and addressed by the Court were in large measure the rights of blacks who were prevented from serving as jurors. But the right to sit on a jury is quite distinct from the right of a defendant to be tried by a jury from which members of his race have not been systematically excluded.

The Fourteenth Amendment guarantees due process as well as equal protection, but at the time *Swain* was decided it was not yet settled which jury-trial rights were guaranteed by that amendment's due process clause. We now know that the Sixth Amendment applies fully to the states through the Fourteenth Amendment, *Duncan v. Louisiana*, 391 U.S. 145, 88 S.Ct. 1444, 20 L.Ed.2d 491 (1968); what has not been resolved is whether the Sixth Amendment guarantees the right to a jury from which eligible jurors have not been excluded because of their race. This question was raised but not decided in two recent cases in this circuit. *See United States v. Clark*, 737 F.2d 679 (7th Cir.1984) facts of case failed to raise presumption of racial motivation); *United States ex rel. Palmer v. DeRobertis*, 738 F.2d 168 (7th Cir.), *cert. denied*, —— U.S. ——, 105 S.Ct. 306, 83 L.Ed.2d

241 (1984) (habeas petitioner waived objection by failing to raise it in state court). Other circuits have split on the question, *compare Weathersby v. Morris*, 708 F.2d 1493, 1497 (9th Cir.1983), *and United States v. Childress*, 715 F.2d 1313 (8th Cir.1983) (no Sixth Amendment right), *with McCray v. Abrams*, 750 F.2d 1113 (2d Cir.1984), and *Booker v. Jabe*, 775 F.2d 762 (6th Cir.1985), and the Supreme Court has heard oral argument on this question in an appeal from a state supreme court, *Batson v. Kentucky*, —— U.S. ——, 105 S.Ct. 2111, 85 L.Ed.2d 476 (1985).

As Judge Peck and I have viewed it, the question presents a clash between two devices, the peremptory challenge and the requirement of representativeness in the jury pool, both of which are intended to secure an impartial jury and neither of which we wanted to see destroyed. For the most part they do not conflict, but when they do, one must give way partially so that neither will be destroyed.

The Sixth Amendment guarantees that the jury pool from which a jury is selected must contain a representative cross-section of the community. *Taylor v. Louisiana*, 419 U.S. 522, 95 S.Ct. 692, 42 L.Ed.2d 690 (1975). The representativeness requirement does not extend directly to the petit jury—no defendant can demand a perfect cross-section on his jury—but the fact that there is not a direct connection does not mean that there is no connection at all. If the Sixth Amendment has implications for the jury pool, that can only be because it has some implication for the jury that actually sits at trial. In *Williams v. Florida*, 399 U.S. 78, 90 S.Ct. 1893, 26 L.Ed.2d 446 (1970), the Supreme Court held that a six-person jury was constitutionally acceptable, noting that a jury should be large enough "to promote group deliberation, free from outside attempts at intimidation, and to provide a *fair possibility for obtaining a representative cross-section* of the community." *Id.* at 100, 90 S.Ct. at

1906 (emphasis added). In *Ballew v. Georgia*, 435 U.S. 223, 98 S.Ct. 1029, 55 L.Ed.2d 234 (1978), it held that a five-person jury was not, expressing concern about "the ability of juries truly to represent the community as membership decreases below six." *Id.* at 242, 98 S.Ct. at 1040. Although the Sixth Amendment does not guarantee a representative trial jury, it does appear to guarantee the *possibility* of a representative jury. In the absence of that possibility, the negative effect upon defendants who belong to the group excluded is not difficult to imagine; it will be especially severe where the group suffers from community prejudice. Judge Peck and I thought it beyond dispute, therefore, that the Sixth Amendment's protection lies in its requirement that the state cannot interfere with the possibility that the jury will be representative.

There is no constitutional right to peremptory challenges. *Swain*, 380 U.S. at 219, 85 L.Ed.2d at 835, but the peremptory challenge has a long history, serves an important function and should not lightly be narrowed. The peremptory challenge allows each side to eliminate jurors whom it suspects, for reasons it cannot articulate or for reasons not reaching the level of cause, of being partial to the other side. With peremptory challenges, the resulting jury should be closer to the ideal of a body without sympathies for either side. And yet the peremptory challenge may conflict with the goal of securing to each defendant the possibility of a representative jury, for with enough peremptory challenges a prosecutor can, if he chooses, make sure that members of a minority group do not appear on any jury where their presence would be a hinderance to him.

Judge Peck and I therefore believed that the only option open to the court in these circumstances was to limit the peremptory challenge in some way. We did not believe that this mechanism for insuring jury impartiality would be destroyed if abuses of it were made subject

to objection. We therefore suggested a limitation that we think would be the least intrusive while complying with the demands of the Sixth Amendment. Rather than reduce the number of peremptory challenges, as some have suggested, we sought to limit the prosecutor with a procedure that would screen out only cases of discriminatory abuse. Two circuits have placed such limits on the use of the peremptory challenge to avoid violating the Sixth Amendment. *See Booker v. Jabe*, *supra*, and *McCray v. Adams*, *supra*. A number of other circuits have done so as an exercise of their supervisory powers. *See United States v. Leslie*, 759 F.2d 366 (5th Cir.1985) (*en banc*); *United States v. Jackson*, 696 F.2d 578, 593 (8th Cir.1982), cert. denied, 460 U.S. 1073, 103 S.Ct. 1531, 75 L.Ed.2d 952 (1983). *See also United States v. McDaniels*, 379 F.Supp. 1243, 1249 (E.D.La.1974). State supreme courts have followed a similar route, *see State v. Neil*, 457 So.2d 481 (Fla.1984); *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499 (1979); *People v. Wheeler*, 22 Cal.3d 258, 148 Cal.Rptr. 890, 583 P.2d 748 (1978).

According to the procedure adopted by these courts and suggested by Judge Peck and me, the defendant would have to raise a timely objection and make out a prima facie case by showing that the persons excluded were members of a cognizable and suspect group and that those challenged were more likely to have been challenged because of the group they belong to than because of any specific bias. Once the prima facie case was made, it would be up to the prosecutor to rebut it. The appropriate rebuttal would involve bias, of course, because bias is supposed to be the reason for the challenges in the first place. The prosecutor's rationale would not have to be one that would sustain a challenge for cause, but it would have to be both race-neutral and supported by the record. This procedure would not prevent the prosecutor from excluding two, or three, or four of

a given race; but it would prevent him from either using *all* of his peremptories to exclude members of a race, or from using his peremptories to systematically exclude all members of a race. All of this would fall short of destroying the peremptory challenge. The prosecutor would be free to use his challenges as he chose, so long as he did not use them for the impermissible purpose of systematically excluding blacks, or members of one cognizable group, from the petit jury.

For these reasons, which were set forth at length in the proposed panel opinion, I think *en banc* review unnecessary and I therefore respectfully dissent from the order directing rehearing *en banc*.

IN THE UNITED STATES COURT OF APPEALS
FOR THE SEVENTH CIRCUIT

(Title Omitted in Printing)

Appeal from the United States District Court
for the Northern District of Illinois, Eastern Division
No. 84 C 1934—WILLIAM T. HART, *Judge*

ARGUED OCTOBER 23, 1986—DECIDED MAY 11, 1987*

OPINION OF THE COURT

Before BAUER, *Chief Judge*, CUMMINGS, WOOD, CUDAHY, POSNER, COFFEY, EASTERBROOK, and RIPPLE, *Circuit Judges*. The original panel decision in this case reversing the order of the district court that denied the appellant Frank Teague's petition for a writ of habeas corpus was vacated, *United States ex rel. Teague v. Lane*, 779 F.2d 1332 (7th Cir. 1985), and the case set for rehearing en banc pursuant to Circuit Rule 16(e).[1] We now affirm the order of the district court denying Teague's petition for a writ of habeas corpus.

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* The original opinion in this case with Judge John L. Coffey dissenting was circulated to the active members of the court pursuant to Circuit Rule 16(e). A Majority of the court voted to rehear the case en banc.

[1] The rehearing en banc was postponed until after the United States Supreme Court had decided *Batson v. Kentucky*, 106 S. Ct. 1712 (1986), which was pending before the Supreme Court when we vacated the original panel decision in *Teague*.

I

COFFEY, *Circuit Judge*. Teague, a black man, was convicted after a jury trial in an Illinois court for attempted murder and armed robbery.[2] In the process of selecting the *Teague* jury, the prosecution in the exercise of its peremptory challenges excluded ten black jurors. In the exercise of the defendant's peremptory challenges, the only other black on the juror list was removed. The defendant initially challenged the State's use of its peremptory challenges after the state had exercised six of its peremptories and again after jury selection was completed claiming that the State's exclusion of all blacks from the jury deprived him of his right to "trial by a jury of his peers." The trial court rejected the defendant's argument that he was deprived of a "trial by his peers" stating that "the jury appears to be a fair jury" and the Illinois Court of Appeals affirmed the defendant's conviction explaining that no restriction could be placed on a prosecutor's exercise of peremptory challenges in the absence of a demonstration that blacks had been systematically excluded under the *Swain v. Alabama* test. *People v. Teague*, 108 Ill. App. 3d 891 (1st Dist. 1982). The Illinois Supreme Court denied Teague's Petition for Leave to Appeal, 93 Ill. 2d 547 (1983), and the United States Supreme Court denied *certiorari*. 464 U.S. 867 (1983). Teague then filed a petition for a writ of habeas corpus in the federal district court. The district court denied Teague's petition for a writ of habeas

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[2] Teague was charged with attempted murder, aggravated battery, and armed robbery. Section 115-4(e) of the Illinois Code of Criminal Procedure provides in pertinent part:

> "A defendant . . . shall be allowed 20 peremptory challenges on a capital case, 10 in a case on which the punishment may be imprisonment in the penitentiary [including attempted murder and armed robbery], and 5 in all other cases. . . . The State shall be allowed the same number of peremptory challenges as all defendants."

Ill. Rev. Stat. Ch. 38, 115-4(e).

corpus explaining that Teague's claim that his constitutional rights were violated by the prosecution's use of its peremptories was "foreclosed by *Swain* and the Seventh Circuit's recent decisions in *United States v. Clark* [737 F.2d 679 (7th Cir. 1984)], and *United States ex rel. Palmer v. DeRoberts*, [738 F.2d 168 (7th Cir. 1984)]."

In *Batson*, 106 S. Ct. 1712 (1986), the Supreme Court decided that "the Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable impartially to consider the State's case against a black defendant."[3] The *Batson* decision expressly overruled *Swain v. Alabama*, 380 U.S. 202 (1965), but did not address the sixth amendment question concerning the right to a trial by an impartial jury. In *Allen v. Hardy*, 106 S. Ct. 2878 (1986), the Supreme Court held that *Batson* was not to be applied "retroactively [to cases such as Teague's] on collateral review of convictions that became final before our opinion [in *Batson*] was announced."[4] However, even if *Batson* were to be applied retroactively to Teague's case, it would not control this court's disposition of Teague's petition for habeas corpus, since Teague challenges his conviction on sixth amendment[5] grounds and does not

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[3] The Equal Protection Clause of the Fourteenth Amendment provides: "[No state shall] deny to any person within its jurisdiction the equal protection of the laws."

[4] Teague argues that we should determine the "finality" of his appeal as of the date the Supreme Court denied *certiorari* in *McCray v. Abrams*, 103 S. Ct. 2438 (1983). However *Allen* makes clear that "finality" for purposes of the retroactive application of *Batson* is to be determined as of the date *Batson* was decided and Teague has not persuaded us that *Allen* means anything other than what it expressly states.

[5] The sixth amendment provides:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence."

raise an equal protection claim subject to the holdings in *Batson* and *Allen*.[6]

II

In *Batson v. Kentucky*, 106 S.Ct. 1712 (1986), the United States Supreme Court held that "The Equal Protection Clause forbids the prosecutor to challenge potential jurors solely on account of their race or on the assumption that black jurors as a group will be unable

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[6] Counsel for Teague asserted at oral argument that this court could decide Teague's appeal on Equal Protection grounds under *Swain v. Alabama* if we refused to apply *Batson* retroactively to Teague's appeal. Although we are persuaded by the State's argument that Teague did not specifically raise a *Swain v. Alabama* claim in the state court and therefore he is procedurally barred from doing so under *Wainwright v. Sykes*, 433 U.S. 72 (1977), we reject Teague's Equal Protection argument in substance as well. Teague did not claim in state court nor in the district court that the prosecution had engaged in the systematic exclusion of blacks from petit juries in case after case. Thus, Teague has failed to meet his initial burden under the *Swain v. Alamaba* analysis. Teague also argues, based on *Weathersby v. Morris*, 708 F.2d 1493 (9th Cir. 1983), that where the prosecutor volunteers an explanation for the use of his peremptory challenges, *Swain* does not preclude the court from examining the stated reasons to determine the legitimacy of the prosecutor's motive in exercising his peremptories. This court has refused to read *Swain* so broadly. In *United States v. Clark*, 737 F.2d 679, 682 (7th Cir. 1984), we noted that absent evidence that established a pattern of systematic exclusion of blacks "larger than the single case" there was no basis for an Equal Protection challenge even if it could be demonstrated that the prosecution had exercised its peremptories on the basis of race. Accordingly, even if Teague's Equal Protection claim based on *Swain* was not barred under *Wainwright v. Sykes*, we would reject it on the basis of our prior refusal to read *Swain* as broadly as the Ninth Circuit has in *Weathersby*.

impartially to consider the State's case against a black defendant." *Id.* at 1719. The *Batson* decision adopted a new analysis for establishing whether the prosecution's use of its peremptory challenges had violated the Equal Protection Clause and "reject[ed] this [the *Swain v. Alabama*] evidentiary formulation [for establishing Equal Protection violation] as inconsistent with standards that have been developed since *Swain* for assessing a prima facie case under the Equal Protection Clause." *Id.* Under *Batson*,

> "a defendant may establish a prima facie case of purposeful discrimination in selection of the petit jury solely on evidence concerning the prosecutor's exercise of peremptory challenges at the defendant's trial. To establish such a case, the defendant first must show that he is a member of a cognizable racial group, *Castaneda v. Partida, supra,* 430 U.S., at 494, 97 S.Ct., at 1280, and that the prosecutor has exercised peremptory challenges to remove from the venire members of the defendant's race. Second, the defendant is entitled to rely on the fact, as to which there can be no dispute, that peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.' *Avery v. Georgia, supra,* 345 U.S., at 562, 73 S.Ct., at 892. Finally, the defendant must show that these facts and any other relevant circumstances raise an inference that the prosecutor used that practice to exclude the veniremen from the petit jury on account of their race. This combination of factors in the empanelling of the petit jury, as in the selection of the venire, raises the necessary inference of purposeful discrimination."

Id. at 1722-23. The *Swain* court refused to adopt a rule that would allow a criminal defendant to establish an Equal Protection violation simply by demonstrating that in his particular case, the prosecution had used its peremptories to remove all blacks from the jury actually empanelled to try the defendant:

> "In the light of the purpose of a peremptory system and the function it serves in a pluralistic society in connection with the institution of jury trial, we cannot hold that the constitution requires an examination of the prosecutor's reasons for the exercise of his challenges in any given case. The presumption in any particular case must be that the prosecutor is using the State's challenges to obtain a fair and impartial jury to try the case before the court. The presumption is not overcome and the prosecutor therefore subjected to examination by allegations that in the case at hand all Negroes were removed from the jury or that they were removed because they were Negroes. Any other result, we think, would establish a rule wholly at odds with the peremptory challenge system as we know it. Hence the motion to strike the trial jury was properly denied in this case."

380 U.S. at 223. Instead, *Swain* required that a defendant seeking to establish an Equal Protection violation must demonstrate that the prosecutor systematically used his peremptories to exclude Blacks or other suspect classes from petit juries in case after case, and not just that all Blacks were peremptorily removed from the jury in the particular defendant's case:

> "We have decided that it is permissible to insulate from the inquiry the removal of Negroes of a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, a partciular defendant involved and the particular crime charged. But when the prosecutor in a county, *in case after case*, whatever the circumstances, whatever the crime and *whoever the defendant or the victim may be*, is responsible for the removal of Negroes who have been selected

> as qualified jurors and the jury commissioners and who survive challenges for cause, with the result that *no Negroes ever serve on petit juries*, the Fourteenth Amendment claim takes on added significance."

Id. (emphasis added).

Batson rejected this approach as a requirement for establishing an Equal Protection violation based on the prosecutor's use of peremptory challenges. The court explained that *Swain*: "Placed on defendants the crippling burden of proof" and thus "prosecutors peremptory challenges are now arguably immune of constitutional scrutiny." 106 S. Ct. at 1720-21 (footnote omitted). Accordingly, the court in *Batson* rejected the *Swain* court's "evidentiary formulation [for establishing that a prosecutor used its peremptories for a constitutionally impermissible purpose] as inconsistent with standards that have developed since *Swain* for assessing a prima facie case under the Equal Protection Clause." *Id.* at 1719.

The *Batson* decision makes clear that the court decided the case on equal protection grounds and declined to rule on Batson's claimed sixth amendment violation:

> "We agree with the State that resolution of the petitioner's claim properly turns on application of equal protection principles and express no view on the merits of any of petitioner's Sixth Amendment arguments."

Batson, 106 S. Ct. at 1716 n. 4.[7] Although in *Batson* a criminal defendant was allowed to establish a violation

[7] The concurring and dissenting judges apparently read footnote 4 in *Batson* as implying that the Supreme Court decided *Batson* on Equal Protection grounds even though the petitioner had never raised an Equal Protection claim. The petitioner in *Batson*, unlike Teague, objected to the prosecutor's use of peremptory challenges on Equal Protection grounds in the state trial court, and thus, there was a basis in the record for deciding *Batson* on Equal Protection grounds. In contrast, since Teague based his objection to the prosecutor's use of peremptories on the fair cross-section requirement of the Sixth Amendment there is no basis in the record for deciding his appeal on Equal Protection grounds. Teague's subsequent arguments in the state courts did not address Equal Protection and thus Teague's appeal is clearly distinguishable from *Batson*. Teague asserted an Equal Protection argument more than one year after his initial argument before this court pursuant to our request that the parties brief the effect on Teague's appeal of the Supreme Court's decision in *Batson*. Unfortunately for Teague, the Supreme Court's decision in *Allen* makes clear that Teague is not entitled, any more than the petitioner in *Allen*, to raise an Equal Protection claim at this stage in the proceedings.

of the equal protection clause by alleging, as Teague has, that the prosecution exercised its peremptories solely on the basis of a prospective juror's race, the Supreme Court's *Allen v. Hardy*, 106 S. Ct. 2878 (1986) decision, precludes an application of the *Batson* rule to Teague's appeal. In *Allen*, decided just two months after *Batson*, the court held that *Batson* did not apply "retroactively on collateral review of convictions that became final before our opinion [in *Batson*] was announced." The court went on to explain that:

> "By final we mean where the judgment of conviction was rendered, the availability of appeal exhausted, and the time for petition for *certiorari* had elapsed before our decision in *Batson v. Kentucky*."

Id. at n. 1. Teague's appeals were rejected by the Illinois appellate courts and his petition for writ of *certiorari* from the United States Supreme Court was denied on October 3, 1983. *See Teague v. Illinois*, 464 U.S. 867 (1983). Thus, Teague's case is "final" for purposes of applying *Batson* retroactively and therefore our review of Teague's appeal is limited solely to his sixth amendment argument, an argument the Supreme Court declined to consider in *Batson*.

Essentially, Teague relies on *Smith v. Texas*, 311 U.S. 128 (1940), and subsequent Supreme Court decisions, to

argue that the "fair cross section of the community" requirement as found in the sixth amendment is applicable to jury pools from which the petit jury is selected to reflect the trial community and must likewise be applied to the jury ultimately empanelled (petit jury) for trial. Teague asserts that the use of peremptory challenges to exclude certain classes of a community from the petit jury in effect undermines the Supreme Court's fair cross-section requirement in the jury pool and contravenes the very idea of a jury composed of the peers and equals of the person on trial. Teague acknowledges that the Supreme Court in *Taylor v. Louisiana*, 419 U.S. 522 (1975), refused to extend the fair cross-section requirement to the petit jury, but maintains that two Supreme Court cases, *Williams v. Florida*, 399 U.S. 78 (1970), and *Ballew v. Georgia*, 435 U.S. 223 (1978), addressing the small number of jurors on petit juries support his argument that the sixth amendment requires the fair cross section principle be applied to petit juries as well as the jury pools they are drawn from. Teague asserts that *Williams v. Florida*, stands for the proposition that the sixth amendment requires that the petit jury must be selected pursuant to procedures that provide a "fair possibility" of obtaining a petit jury representative of the community. Accordingly, Teague reads the Supreme Court's determination in *Ballew v. Georgia*, that a trial by jury of less than six persons[8] violates the sixth amendment because it in effect mathematically decreases the opportunity for meaningful representation of a cross section of the community as supporting his position. Teague interprets *Ballew* as meaning that the use of peremptory challenges to remove prospective jurors on the basis of race alone violates the sixth amendment since exercising one's peremptory challenges on the basis of

[8] The following states allow trial by a jury of less than twelve persons in felony cases: Arizona, Connecticut, Florida, Louisiana, Massachusetts, Nebraska, and Utah. *State Court Organization 1980*, National Center for State Courts (1980).

race alone decreases the "opportunity" for minority representation on the petit jury and thereby prevents the jury from reflecting a fair cross-section of the community. Therefore, according to Teague, the use of peremptories to remove prospective jurors on the basis of race alone violates the sixth amendment since the petit jury ultimately empanelled does not reflect a fair cross-section of the community.

Teague's argument that the petit jury should be considered the same as the jury pool for purposes of the fair cross-section requirement rests on the mistaken assumption that the word "impartial" as used in the sixth amendment requires that the petit jury reflect a cross-section of the community from which it is drawn. Teague has not argued to this court nor any of the other courts that have heard his case, that the jury that tried him was not impartial. Rather, he asserts only that the jury in his case did not represent a cross-section of the community wherein he was tried. We refuse to break new ground and read such a requirement into the sixth amendment for the decisions of the United States Supreme Court to date fail to support such an argument. Since we agree with the United States Supreme Court and not with Teague's theory that the sixth amendment requires that the petit jury be identical to the community where the jury is drawn from, we reject Teague's assertion that the prosecutor's use of his peremptories to remove ten prospective black jurors from the petit jury violated his sixth amendment right to trial by an impartial jury.

The sixth amendment provides that:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed. . . ."

The United States Supreme Court has consistently interpreted the sixth amendment right to trial by an impar-

tial jury to require a jury that is "indifferent" and that the petit jury be selected from a "fair cross-section of the community:" "In essence, the right to jury trial guarantees to the criminally accused a fair trial by a panel of impartial, 'indifferent' jurors," *Irwin v. Dowd*, 366 U.S. 717, 723 (1961), and "A fair possibility for obtaining a jury constituting a representative cross section of the community." *Taylor v. Louisiana*, 419 U.S. 522, 529 (1975). In *Taylor*, the court explained:

> "The unmistakable import of this court's opinions, at least since 1940, *Smith v. Texas*, *supra*, and not repudiated by intervening decisions, is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial. Recent federal legislation governing jury selection within the federal court system has a similar thrust. Shortly prior to this court's decision in *Duncan v. Louisiana*, *supra*, the Federal Jury Selection and Service Act of 1968 was enacted. In that Act, Congress stated 'The policy of the United States that all litigants in Federal courts entitled to trial by jury shall have the right to grand petit juries selected at random from a fair cross section of the community in the district or division wherein the court convenes.' 28 U.S.C. § 1861. In that Act, Congress also established the machinery by which the state policy was to be implemented. 28 U.S.C. §§ 1862 through 1866. Passing this legislation, the Committee Reports of both the House and the Senate recognized that the jury plays a political function in the administration of the law and that the requirement of a jury's being chosen from a cross section of the community was fundamental to the American system of justice. Debate on the floors of the House and Senate on the Act invoked the Sixth Amendment, the Constitution generally, and prior decisions of this Court in support of the Act."

419 U.S. at 529-31 (footnotes omitted). Although the Supreme Court has interpreted the sixth amendment to require that the jury in a criminal trial be chosen from a jury pool that represents a fair cross-section of the community, it has never interpreted the explicit command of the sixth amendment that the petit jury itself be "impartial" to require that the petit jury actually represent each and every element of the community from which it is selected. Instead, the fair cross-section requirement, like all constitutionally mandated characteristices of the jury, has its origins in the purposes the Supreme Court has interpreted the sixth amendment right to jury trial to serve:

> "The purpose of the jury is to guard against the exercise of arbitrary power—to make available the common sense judgment of the community as a hedge against the over zealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of the judge. This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage, but is also critical to public confidence in the fairness of the criminal justice system."

Taylor, 419 U.S. at 531 (citation omitted). Contrary to Teague's assertion that the Supreme Court decisions in *Williams* and *Apodaca v. Oregon*, 406 U.S. 404 (1972), require us to apply the fair cross-section requirement to the petit jury, those decisions, as well as the decisions in *Ballew* and *Burch v. Louisiana*, 441 U.S. 130 (1979), require only that the jury selection process provide for the "possibility" that the jury empanelled reflect a fair cross-section of the community. The decisions of the Supreme Court make clear that absent a pattern of system-

atic exclusion of a particular class from the petit jury, no constitutional wrong has occurred.[9] As the court explained in *Apodaca*:

> "There are two flaws in this argument [that the fair cross-section requirement requires a unanimous verdict]. One is petitioners' assumption that every distinct voice in the community has a right to be represented on every jury and a right to prevent conviction of a defendant in any case. All that the Constitution forbids, however, is systematic exclusion of identifiable segments of the community from jury panels and from the juries ultimately drawn from those panels; a defendant may not, for example, challenge the makeup of a jury merely because no members of his race are on the jury, but must prove that his race has been systematically excluded. See *Swain v. Alabama*, 380 U.S. 202, 208-209, 85 S.Ct. 824, 829, 13 L.Ed.2d 759 (1965); *Cassell v. Texas*, 339 U.S. 282, 286-287, 70 S.Ct. 629, 631, 94 L.Ed. 839 (1950); *Akins v. Texas*, 325 U.S. 398, 403-404, 65 S.Ct. 1276, 1279, 89 L.Ed. 1692 (1945); *Ruthenberg v. United States*, 245 U.S. 480, 28 S.Ct. 168, 62 L.Ed 414 (1918). No group, in short, has the right to participate in the overall legal processes by which criminal guilt and innocence are determined."

406 U.S. at 413.

However, the Supreme Court decisions distinguish between the requirement that jury pools reflect a fair cross-section of the community and the requirement that a petit jury be impartial:

> "Trial by jury presupposes a jury drawn from a pool broadly representative of the community *as well as* impartial in *a specific case*."

[9] And the cases make clear that when a systematic pattern of exclusion is established, the Equal Protection Clause and not the sixth amendment is the constitutional provision implicated.

Thiel v. Southern Pacific Company, 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting) (adopted by Court in *Taylor*, 419 U.S. at 531) (emphasis added). Indeed, the Supreme Court has gone so far as to state:

> "It is fundamental in questioning the composition of a jury that a mere showing that a class was not represented in a *particular jury* is not enough."

Fay v. New York, 332 U.S. 261, 285 (1947) (emphasis added). And the court in *Taylor* read its prior decisions concerning jury composition and the fair cross-section requirement as specifically limiting the fair cross-section requirement to the jury pool from which the petit jury was ultimately empanelled:

> "It should also be emphasized that in holding that petit juries must be drawn from a source fairly representative of the community we impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition."

419 U.S. at 538 (citation omitted).

Thus, the decisions of the United States Supreme Court to date make clear that the fair cross-section requirement of the sixth amendment does not apply to the petit jury itself, and we are not persuaded that sufficient reasons or facts presented to us in this record give reasons for us to expand the scope of the Supreme Court's holdings in Teague's case. Several factors mandate against such an unwarranted expansion. First, the process of random selection may result in the under—or over representation of particular groups on a venire and the removal of jurors for cause likewise may result in the under—or over representation of a particular group on a petit jury in a given case. Second, the requirement that a specific group be represented on any given petit jury would necessarily entail tremendous administrative problems in the empanel-

ling of a jury; in each case, the trial court would be called upon to expend a greater amount of time in order to ascertain the race, nationality, religion, occupation, and other characteristics of members of the community in relation to the facts and circumstances of the case on trial and determine which groups of the population were relevant, and thus essential to the composition of each and every petit jury. As we noted in *Clark*, "[t]he potential for stretching out criminal trials that are already too long, by making the voir dire a Title VII proceeding in miniature" is one of several practical considerations against requiring that the petit jury represent a cross section of the community. 737 F.2d at 682. *See also* Saltzburg and Powers, *Peremptory Challenges and the Clash Between Impartiality and Group Representation*, 41 Md. L. Rev. 337, 347-48 n.47 (1982). The Supreme Court acknowledged these problems in a footnote in *Batson*:

> "Similarly, though the Sixth Amendment guarantees that a petit jury will be selected from a pool of names representing a cross-section of the community, *Taylor v. Louisiana*, 419 U.S. 522 (1975), we have never held that the Sixth Amendment requires that 'petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population,' *Id.* at 538. Indeed, it would be impossible to apply a concept of proportional representation to the petit jury in view of the heterogeneous nature of our society. Such a possibility is illustrated by the court's holding that a jury of six persons is not unconstitutional. *Williams v. Florida*, 399 U.S. 78, 102-103 (1970)."

Batson, 106 S. Ct. at 1717 n.6. In *Lockhart v. McCree*, 106 S. Ct. 1758 (1986), the Supreme Court further explained its reasons for not applying the fair cross-section requirement to the petit jury:

> "we do not believe that the fair cross-section requirement can, or should, be applied as broadly as that court attempted to apply it. We have never invoked the fair cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large. See *Duren v. Missouri*, 439 U.S. 357, 363-364, 99 S.Ct. 664, 668, 58 L.Ed.2d 579 (1979); *Taylor v. Louisiana*, 419 U.S. 522, 538, 95 S.Ct. 692, 701-02, 42 L.Ed.2d 690 (1975) ('[W]e impose no requirement that petit juries actually chosen must mirror the community and reflect the various distinctive groups in the population'); cf. *Batson v. Kentucky*, —— U.S. ——, ——, n.4, 106 S.Ct. 1712, 1716, n. 4, 89 L.Ed.2d —— (1986) (expressly declining to address 'fair cross-section' challenge to discriminatory use of peremptory challenges). The limited scope of the fair cross-section requirement is a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly 'representative' petit jury, see *id.*, at ——, n. 6, 106 S.Ct. at 1717, no. 6, a basic truth that the Court of Appeals itself acknowledged for many years prior to its decision in the instant case. See *United States v. Childress*, 715 F.2d 1313 (CA8 1983) (en banc), *cert. denied*, 464 U.S. 1063, 104 S.Ct. 744, 79 L.Ed.2d 202 (1984); *Pope v. United States*, 372 F.2d 710, 725 (CA8 1967) (Blackmun, J.) ('The point at which an accused is entitled to a fair cross-section of the community is when the names are put in the box from which the panels are drawn'), vacated on other grounds, 392 U.S. 651, 88 S.Ct. 2145, 20 L.Ed.2d 1317 (1968). We remain convinced that an extension of the fair cross-section requirement to petit juries would be unworkable and unsound, and we decline McCree's invitation to adopt such an extension."

Further, although we believe the fair cross-section requirement aids in the selection of an impartial jury, the requirement itself does not guarantee an impartial jury—and would not even if applied to the petit jury. Thus, the parties must have peremptory challenges available to them so that they might have the opportunity to eliminate any prospective juror whom they believe may not be impartial even though the jury was drawn from a pool representing a fair cross-section of the community. Further, peremptories help to ensure impartiality by compensating for the limitations inherent in the jury system itself; there is no guarantee that any group of twelve (or six) empanelled to try a case will reflect all attitudes, beliefs, etc. in a community. To prevent the unfairness of a trial heard by a panel of jurors slanted toward one view or another should chance so provide (i.e., random selection of the pool), the parties are allowed to exercise the right of the peremptory challenge in order that they might be able to select a jury that they believe will be impartial while serving their individual best interests in their sincere attempt to achieve justice. Peremptory challenges are consistent with the fair cross-section requirement to insure that the jury that ultimately tries the case will be impartial.

Moreover, many of the circuits that have addressed the issue of whether the fair cross section requirement of the sixth amendment mandates that the petit jury mirror the community from which it is drawn have refused to extend the fair cross section requirement to the petit jury. *See United States v. Thompson*, 730 F.2d 82, 85 (8th Cir. 1984), *cert. denied*, 105 S. Ct. 443 (1984); *Pregean v. Blackburn*, 743 F.2d 1091, 1103-04 (5th Cir. 1984); *United States v. Witfield*, 715 F.2d 145, 146-47 (4th Cir. 1983); *Weathersby v. Morris*, 708 F.2d 1493, 1497 (9th Cir. 1983), *cert. denied*, 104 S. Ct. 719 (1984). *Cf. Willis v. Zant*, 720 F.2d 1212, 1219 n. 14 (11th Cir. 1983), *cert. denied*, 104 S. Ct. 3546 (1984).

Finally, extending the fair cross-section requirement to the petit jury as Teague suggests would effectively undermine the use of peremptory challenges in criminal cases. We refuse to expand or enlarge the parameters of the Supreme Court decisions addressing the fair cross section requirement, for doing so would seriously disrupt the trial process as it currently exists, especially in view of the Supreme Court's explicit statements that such an expansion is not justified. *See Taylor; Fay.* In *Swain*, the court outlined the history of the peremptory challenge from the days of the common law of England to the law as it has developed in the United States and concluded that:

> "[T]he persistence of peremptories and their extensive use demonstrate the long and widely held belief that the peremptory challenge is a necessary part of trial by jury.... The [peremptory] challenge is 'one of the most important of the rights secured to the accused.'"

Swain, 380 at 219 (quoting *Pointer v. United States*, 151 U.S. 396 (1894)). But the right of the peremptory challenge is not limited to the accused. The *Swain* court recognized that: "The view in this country has been that the system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against his prosecution. Between him and the state, the scales are to be evenly held.'" 380 U.S. at 220 (quoting *Hayes v. State of Missouri*, 120 U.S. 68, 70 (1887)).

The *Swain* court described the function of the peremptory challenge as

> "Not only to eliminate extremes of partiality on both sides, but to assure the parties that the jurors before whom they try the case will decide on the basis of the evidence placed before them, and not otherwise. . . . Indeed the very availability of peremptories allows counsel to ascertain the possibility of bias through probing questions on voir dire and facilitates

> the exercise of challenges for cause by removing the fear of incurring a juror's hostility through examination and challenge for cause."

380 U.S. at 219-20. The court further noted, "The essential nature of the peremptory challenges is that it is one exercised without a reason stated, without inquiry and without being subject to the court's control." *Id.* at 220. " '[I]t is, as *Blackstone* says, an arbitrary and capricious right, and it must be exercised with full freedom or it fails of its full purpose.' " *Id.* at 219 (quoting *Lewis v. United States*, 146 U.S. 370, 378 (1892)).

Teague's argument that the fair cross-section requirement of the sixth amendment extends to the petit jury and restricts the use of peremptory challenges ignores the fact that the peremptory challenge is an essential tool not only to the prosecutor, but to the defendant as well, and their combined effort to obtain a fair and impartial petit jury in their search for the truth of the facts presented and ultimate justice for all. Any requirement that would interfere with the use of peremptory challenges would harm the defendant by disarming the defendant or his attorney of the ability to rely on intuitive feelings or past trial experience in selecting the jury that will pass judgment on the defendant. The

> "system of peremptory [challenges]—challenges without cause, without explanation, and without judicial scrutiny—affords a suitable and necessary method of securing juries which in fact and in the opinion of the parties are fair and impartial."

Swain, 380 U.S. at 211-12. And the peremptory challenge " 'is, as Blackstone says, an arbitrary and capricious right, and it must be exercised with full freedom, or it fails of its full purpose.' " *Id.* at 219 (quoting *Lewis v. United States*, 146 U.S. 370, 378 (1892)). The sixth amendment literally provides, "in all criminal prosecutions, the accused shall enjoy the right to a speedy and

public trial, by an *impartial* jury" (emphasis added). "In essence, the right to a jury trial guarantees to the criminally accused a fair trial by a panel of *impartial*, '*indifferent*' jurors." *Irwin v. Dowd*, 366 U.S. 717, 722 (1961) (emphasis added). Although the sixth amendment provides protection only for the defendant, if we believe that the American system of justice is based on the premise that a jury trial is a search for the truth, we must acknowledge that both the prosecution and defendant are entitled to an impartial jury. Thus, the courts have recognized that "The State also enjoys the right to an impartial jury." *Spinkellink v. Wainwright*, 578 F.2d 582, 596 (5th Cir. 1978), *cert. denied*, 440 U.S. 976 (1979).

> "The system should guarantee 'not only freedom from any bias against the accused, but also from any prejudice against the prosecution. Between him and the State, the scales are to be evenly held.' "

Swain, 380 at 220 (quoting *Hayes v. State of Missouri*, 120 U.S. 68, 70 (1887)); *Spinkellink*, 578 F.2d at 596.

The peremptory challenge does not conflict with the right of a defendant to have his jury drawn from a representative jury pool. Both the peremptory challenge and the requirement of the representative venire advanced the constitutional goal of obtaining a fair and impartial jury in the undying quest and search for justice. And it may be that the requirement that a jury venire or pool represent a fair cross-section of the community in fact increases the necessity of employing peremptories to obtain an impartial petit jury.

> "In contrast to the course in England, where both peremptory challenge and challenge for cause have fallen into disuse, peremptories were and are freely used and relied upon in this country, perhaps because juries here are drawn from a greater cross section of a heterogeneous society."

Swain, 380 U.S. at 218. The *Swain* court acknowledged that the "peremptory challenge is a necessary part of trial by jury." *Id.* The court recognized that the challenge for cause alone is insufficient to assure the impartiality of a jury in a given case.

> "While challenges for cause permit rejection of jurors on a narrowly specified, provable and legally cognizable basis of partiality, the peremptory challenge permits rejection for a real or imagined partiality that is less easily designated or demonstrable."

Id. at 220. Thus, the courts have found it proper to exercise a peremptory challenge to exclude a juror who could not be dismissed for cause in the context of a given trial. *See Dobbert v. Strickland*, 718 F.2d 1518, 1524-25 (11th Cirl 1983); *Jordan v. Watkins*, 681 F.2d 1067, 1070 (5th Cir. 1982).

Finally, Teague's argument that *Williams* and *Ballew* require us to extend the fair cross-section requirement to the petit jury is likewise unpersuasive. Although *Williams* and *Ballew* pertain specifically to the composition of petit juries, when viewed in the proper context, they militate against Teague's assertion that the petit jury must contain a cross-section of the community: the six-person Florida jury approved in *Williams* certainly does not guarantee that the jury will consist of a representative cross-section of the community anymore than a 12-person jury. The Supreme Court in *Williams* stated:

> "Even the 12-man jury cannot insure representation of every distinct voice in the community, particularly given the use of the peremptory challenge. As long as arbitrary exclusions of a particular class from the jury rolls are forbidden . . . the concern that the cross section will be significantly diminished if the jury is decreased in size from 12 to 6 seems an unrealistic one."

399 U.S. at 102. The court nevertheless recognized in *Ballew*, "The opportunity for meaningful and appropriate representation does decrease with the size of the panels." 435 U.S. at 237. Thus, it can hardly be doubted that the mathematical probability of obtaining a representative cross-section of the community is reduced when a jury is chosen consisting of six rather than 12 jurors. Notwithstanding the court's recognition in *Ballew* that a five-person jury inhibits the goal of meaningful and appropriate representation on the petit jury, the court in *Ballew* declined to retreat from its holding in *Williams*. The Supreme Court thus recognized that merely decreasing the possibility of obtaining a fair cross-section of the community on the petit jury does not violate the sixth amendment right to a trial by an impartial jury. Further, the record is barren of any proof or testimony establishing community prejudice towards Teague.

The free and unrestrained exercise of peremptory challenges does not eliminate the *possibility* of obtaining a truly representative trial jury and thus does not violate the sixth amendment right to trial by an impartial jury. *See Taylor*, 419 U.S. at 529 (sixth amendment requires "[a] fair possibility for obtaining a jury constituting a representative cross-section of the community"). So long as the jury pool contains a fair cross-section of the community, the possibility of obtaining a representative trial jury remains regardless of how either party exercises its peremptory challenges. Since the sixth amendment requires only that a jury be impartial, we refuse to extend the fair cross-section requirement to require that the petit jury trying a criminal defendant reflect a fair cross-section of the community wherein the trial takes place. Requiring the petit jury to mirror the community will effectively undermine the value of the peremptory challenge without appreciably increasing the ability of the defendant or the prosecution to insure that the jury ultimately empanelled is impartial as required by the

sixth amendment—all at the expense of the American jury system.

III

CONCLUSION

The sixth amendment provides the defendant in a criminal proceeding with the right to a trial by an impartial jury. The Supreme Court has determined that the right to trial by an impartial jury requires that the jury pool from which the petit jury is selected reflect a fair cross-section of the community so as to make possible and probable a petit jury representative of the community in which the defendant is tried. The Supreme Court has made clear, however, that the sixth amendment does not provide the criminal defendant with the right to a petit jury of any particular composition. *Taylor v. Louisiana*, 419 U.S. 522 (1975). Since we are not persuaded by the defendant's argument nor the realities of trial that a petit jury that mirrors the community from which it is drawn guarantees an impartial jury, we are not willing to interpret the sixth amendment as prescribing limits on the prosecutor's (or defendant's) exercise of peremptory challenges. We are confident that all jurors, black, white, or any other race, creed or color, upon the taking of their oath are equally capable of performing their task impartially. To hold that the sixth amendment limits the use of peremptory challenges would undermine the use of peremptory challenges and impair the function of the jury in criminal trials without any demonstrable improvement in the impartiality of juries. Accordingly, we affirm the district court's order denying Teague's petition for a writ of habeas corpus.

RIPPLE, *Circuit Judge*, concurring. I concur in the judgment of the court.

In my view, as Judge Cudahy points out in his dissent, Mr. Teague may properly assert an equal protection claim in this court under the unique circumstances presented here. The Supreme Court, in *Batson v. Kentucky*, 106 S. Ct. 1712, 1716 n.4 (1986), refused to hold that the petitioner was procedurally barred from the obtaining relief on the basis of the equal protection clause even though he had not raised an equal protection claim. I agree with Judge Cudahy that "[i]f one has no obligation to argue to the Supreme Court itself that it overrule one of its own cases, one surely need not argue to a district court that a Supreme Court case is wrong." Dissent at 3 (Cudahy, J.).

Although the equal protection claim is properly before us under the Supreme Court's ruling in *Batson*, that Court's subsequent holding in *Allen v. Hardy*, 106 S. Ct. 2878 (1986), controls our disposition of that claim. In *Allen*, the Supreme Court held that its holding in *Batson* should not be applied retroactively to cases on collateral review of convictions that became final before the *Batson* opinion. 106 S. Ct. at 2880.

I do not believe that the sixth amendment affords Mr. Teague a basis for relief independent from the equal protection analysis set forth in *Batson*. In the period between *Swain v. Alabama*, 380 U.S. 202 (1965), and *Batson*, the sixth amendment analysis was, I respectfully suggest, simply an elliptical way for the lower courts to avoid the precedential effect of *Swain*. *See, e.g., McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984), *vacated*, 106 S. Ct. 3289 (1986). Indeed, in *Batson* itself, the Supreme Court seemed to acknowledge that the sixth amendment argument had played this role. 106 S. Ct. at 1716 n.4. Further, in *Batson*, the Court deliberately noted that application of sixth amendment principles to the petit jury situation would indeed be difficult. *Id.* at 1716 n.6.

Moreover, in deciding that the rule in *Batson* was not retroactive for cases on collateral review, the Supreme Court quite pointedly did not distinguish between equal protection and sixth amendment policy concerns when discussing *Batson*'s theoretical underpinnings:

> By serving a criminal defendant's interest in neutral jury selection procedures, the rule in *Batson* may have some bearing on the truthfinding function of a criminal trial. But the decision serves other values as well. Our holding ensures that States do not discriminate against citizens who are summoned to sit in judgment against a member of their own race and strengthens public confidence in the administration of justice. The rule in *Batson*, therefore, was designed "to serve multiple ends," only the first of which may have some impact on truthfinding.

Allen, 106 S. Ct. at 2880 (citations omitted). Nor can we avoid noting that, in disposing of two cases after its decision in *Batson* where the lower courts had granted relief to a state prisoner on sixth amendment grounds, the Supreme Court vacated the judgments and required reconsideration in light of *Batson* and its non-retroactivity rule.[1] If the sixth amendment analysis of those courts were worthy of independent review, there was ample opportunity to undertake the inquiry or to let the judgments of the lower courts stand. Under these circumstances, I find the subsequent denial of certiorari in *Michigan v. Booker*, 107 S. Ct. 910 (1987), when the Sixth Circuit failed to apply *Batson* and *Allen*, worthy of little weight in our determination. In my view, therefore, the court should not address Mr. Teague's sixth amendment formulation of the equal protection claim he

[1] *Booker v. Jabe*, 775 F.2d 762 (6th Cir. 1985), *vacated sub nom. Michigan v. Booker*, 106 S. Ct. 3289, *aff'd on reconsideration*, 801 F.2d 871 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 910 (1987); *McCray v. Abrams*, 750 F.2d 1113 (2d Cir. 1984), *vacated*, 106 S. Ct. 3289 (1986).

is barred from making because of the non-retroactive application of *Batson*.

CUDAHY, *Circuit Judge*, with whom CUMMINGS, *Circuit Judge*, concurs, dissenting:

This case was heard originally by a panel consisting of Judge John W. Peck of the Sixth Circuit, Judge Coffey and me. I wrote an opinion for the majority finding that Teague had established at least a prima facie case of a violation of his constitutional rights. Judge Coffey dissented. The opinion was circulated to the active members of the court under Rule 16(e), and the court voted to hear the case *in banc*. I dissented from the order setting the case *in banc;* the order, together with my dissent (which is a much-condensed version of the original panel opinion), appears at 779 F.2d 1332 (7th Cir. 1985). I rely on that dissent as a statement of my position on the merits here. After that order but before the *in banc* court heard oral argument, the Supreme Court decided *Batson v. Kentucky*, 106 S.Ct. 1712 (1986), which, by overruling *Swain v. Alabama*, 380 U.S. 202 (1965), determined the merits of the underlying issue favorably to the position of the original panel majority.

I.

At the outset, I find the majority's procedural analysis far-fetched and overreaching, although it is unclear how much of this really matters in the end. For example, the majority asserts that it is "persuaded by the State's argument that Teague did not specifically raise a *Swain v. Alabama* claim in the district court and therefore he is procedurally barred from doing so under *Wainwright v. Sykes*, 433 U.S. 72 (1977)." *Supra* p. 4 n.6. Presumably the majority also claims a failure to raise an equal protection claim in the state courts (which would be more relevant to *Wainwright v. Sykes*). In any event, the con-

tention that Teague has waived his equal protection claim by failing to raise it in any of the courts prior to this one (state or federal) where the peremptory challenge issue has been argued will not stand analysis.

The short answer to these waiver arguments is that the Supreme Court itself in *Batson v. Kentucky* heard argument from the petitioner, Batson, which was directed solely to the Sixth Amendment point (and included the Fourteenth Amendment only to the extent that that amendment applied the Sixth Amendment to the states and not for equal protection purposes). The Court noted that:

> [P]etitioner has argued that the prosecutor's conduct violated his rights under the Sixth and Fourteenth Amendments to an impartial jury and to a jury drawn from a cross-section of the community. Petitioner has framed his argument in these terms in an apparent effort to avoid inviting the Court directly to reconsider one of its own precedents. On the other hand, the State has insisted that petitioner is claiming a denial of equal protection and that we must reconsider *Swain* to find a constitutional violation on this record.

106 S.Ct. at 1716 n.4.

Chief Justice Burger's dissent in *Batson* makes a major point of Batson's failure to raise an equal protection claim either in the state courts or in the Supreme Court:

> In the Kentucky Supreme Court, petitioner disclaimed specifically any reliance on the Equal Protection Clause of the Fourteenth Amendment, pressing instead only a claim based on the Sixth Amendment.
>
> . . .
>
> Even if the equal protection issue had been pressed in the Kentucky Supreme Court, it has surely not been pressed here.

106 S.Ct. at 1731 (Burger, C.J., dissenting). The Supreme Court in *Batson*, of course, ignored these arguments and so should we here. *Batson* itself is thus on all fours procedurally with *Teague*. If one has no obligation to argue to the Supreme Court itself that it overrule one of its own cases, one surely need not argue to a district court that a Supreme Court case is wrong. In *Batson* the State of Kentucky contended that an equal protection claim was being made and that *Swain* controlled. Whether or not Teague has made equal protection an issue in the Illinois courts or in the district court (and the extent to which he has is perhaps debatable),[1] he was answered at every level by the state's contention that an equal protection claim was being made and *Swain* controlled. Having itself relied upon *Swain*, the state is estopped from arguing that equal protection was not properly raised.[2]

[1] Teague contends that he made a *Swain*-based argument in the district court and in this court, citing *Weathersby v. Morris*, 708 F.2d 1493 (9th Cir. 1983), *cert. denied*, 464 U.S. 1046 (1984). This provides an additional answer to the waiver argument.

[2] *Wainwright v. Sykes*, 433 U.S. 72 (1977), does not help the state here because, whether or not Teague raised the equal protection issue in the Illinois courts, those courts rejected Teague's claim on its equal protection merits. *See Ulster County Court v. Allen*, 442 U.S. 140, 152-54 (1979); *United States ex rel. Ross v. Franzen*, 688 F.2d 1181, 1183 (7th Cir. 1982). The Illinois Appellate Court rejected Teague's argument because he ostensibly failed to demonstrate that blacks had been systematically precluded from jury service, as required by *Swain v. Alabama*. *People v. Teague*, 108 Ill. App. 3d 891, 895-96, 439 N.E.2d 1066, 1070 (1st Dist. 1982), *cert. denied*, 464 U.S. 867 (1983). Since the state court denied Teague relief on the ground that *Swain* controlled the result, we could reach the equal protection claim without concerning ourselves with the cause-and-prejudice standard.

As noted, each time Teague has argued a constitutional violation, whether in the state or federal courts, his opponent and the court in question has cited *Swain* as the controlling authority. Two issues may, of course, be so factually and logically related that the raising of one affords the state courts a fair opportunity to

I thus conclude that there is no barrier based on waiver, in the prior history of this litigation or in his arguments made here, to Teague's relying on *Batson* before this court. Teague's opponents in all the courts before this one have relied on *Swain* to defeat Teague's claim. Now that *Batson* has trumped *Swain*, there can be no principled objection to Teague's present reliance on *Batson*.

This still leaves us, of course, with the problem of *Batson*'s non-retroactivity under *Allen v. Hardy*, 106 S.Ct. 2878 (1986). At least *arguendo*, I would agree with the majority that Teague's claim must be sustainable on Sixth Amendment grounds in order to avoid the *Batson* non-retroactivity hurdle erected in *Allen*.

Teague's case is thus entirely parallel to *Booker v. Jabe*, 775 F.2d 762 (6th Cir. 1985). There the Sixth Circuit, on facts similar to those before us, used a Sixth Amendment analysis to decide that the use of peremptory challenges to exclude blacks from a petit jury was unconstitutional. The State of Michigan petitioned for certiorari and, while the petition was pending, the Supreme Court decided both *Batson* and *Allen*. The Court then vacated the judgment in *Booker* and remanded the case to the Sixth Circuit for reconsideration in light of *Batson* and *Allen*. *Michigan v. Booker*, 106 S.Ct. 3289 (1986).

On remand, the Sixth Circuit reinstated the *Booker* judgment and opinion, *Booker v. Jabe*, 801 F.2d 871 (6th Cir. 1986); the State of Michigan again petitioned for certiorari but its petition was denied, *Michigan v. Booker*, 107 S.Ct. 910 (1987). This sequence would, of course, strongly suggest that the non-retroactivity of *Batson*, as determined in *Allen*, had no application to

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consider both. *Williams v. Holbrook*, 691 F.2d 3, 8 (1st Cir. 1982). The majority cannot plausibly conclude that Teague is now making a new or different argument when the other state and federal courts which have heard the matter have determined that *Swain* was dispositive.

Booker (and by extension to *Teague*). Since the Sixth Circuit had decided that *Booker* prevailed on Sixth Amendment principles—an issue left undecided in *Batson*—its decision (entirely consistent with the result in *Batson*) was undisturbed either by *Batson* or by *Allen*. I will, therefore, because of *Allen* join battle on the merits on Sixth Amendment terrain. I will not rely directly on *Batson*'s equal protection analysis even though, as shown, Teague did not waive his rights to assert an equal protection claim in this court.

I shall, however, take account of *Batson* to this very important (in fact critical) extent: The Supreme Court in *Batson* reweighed the costs of imposing inhibitions upon the exercise of the peremptory challenge and of additional administrative burdens on the courts in order to sustain constitutional values in every criminal jury trial.[3] *Batson* was a policy judgment by the Court that

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[3] Thus, *Batson* says:

> The State contends that our holding will eviscerate the fair trial values served by the peremptory challenge. Conceding that the Constitution does not guarantee a right to peremptory challenges and that *Swain* did state that their use ultimately is subject to the strictures of equal protection, the State argues that the privilege of unfettered exercise of the challenge is of vital importance to the criminal justice system.
>
> *While we recognize, of course, that the peremptory challenge occupies an important position in our trial procedures, we do not agree that our decision today will undermine the contribution the challenge generally makes to the administration of justice.* The reality of practice, amply reflected in many state and federal court opinions, shows that the challenge may be, and unfortunately at times has been, used to discriminate against black jurors. By requiring trial courts to be sensitive to the racially discriminatory use of peremptory challenges, our decision enforces the mandate of equal protection and furthers the ends of justice. In view of the heterogeneous population of our nation, public respect for our criminal justice sys-

these were costs which could and should be borne. 106 S.Ct. at 1724. If a like policy judgment becomes part of the Sixth Amendment analysis, the results of that analysis become dramatically more favorable to the defendant—even though his rights derive from a different amendment. The reweighing of costs against constitutional demands in *Batson* is a more than adequate response to the claimed inhibitions on the exercise of peremptory challenges and the administrative difficulties that the majority finds to be such decisive considerations. *Batson* completely demolishes the majority's arguments based on policy. In this respect, the majority opinion is little more than a compendium of outmoded views.

II.

In *Taylor v. Louisiana*, 419 U.S. 522 (1975), the Supreme Court held that the Sixth Amendment guaranteed that the jury pool from which juries are selected must be a representative cross-section of the community. At the time, Louisiana law required that no woman be selected for jury service unless she had previously filed a written declaration of her desire to serve on a jury; in the *Taylor* case itself, there was no woman on the venire from which the jury was drawn. Reviewing earlier cases, the Court said that "the American concept of the jury trial contemplates a jury drawn from a fair cross-section of the community." 419 U.S. at 527. It

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tem and the rule of law will b. strengthened if we ensure that no citizen is disqualified from jury service because of his race.

Nor are we persuaded by the State's suggestion that our holding will create serious administrative difficulties. In those states applying a version of the evidentiary standard we recognize today, courts have not experienced serious administrative burdens, and the peremptory challenge system has survived. We decline, however, to formulate particular procedures to be followed upon a defendant's timely objection to a prosecutor's challenges.

Batson, 106 S.Ct. at 1724 (emphasis supplied) (footnotes omitted).

cited *Smith v. Texas*, 311 U.S. 128, 130 (1940), in which it had held that the exclusion of racial groups from jury service was " 'at war with our basic concepts of a democratic society and a representative government'," 419 U.S. at 527, and went on to say:

> We accept the fair-cross-section requirement as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge . . . . This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool.

Id. at 530 (citation omitted).

As the majority correctly points out, this requirement of representativeness does not extend directly to the petit jury; no defendant has the right to a trial jury that reflects the make-up of the community. The majority opinion devotes many pages to establishing this point, though I must confess that I am at a loss to explain why. No one seems to quarrel with this proposition, least of all Teague. Appellant's Brief at 21.

Teague's position, which was adopted by the panel opinion and which even the majority here seems to endorse at one point in its opinion, *supra* p. 12, is that although there is no right to be tried by a representative petit jury, the Sixth Amendment guarantees the possibility that the jury selected will contain a representative cross-section of the community. In *Williams v. Florida*, 399 U.S. 78 (1970), the Court held that a six-person jury was constitutionally acceptable; in *Ballew*

v. Georgia, 435 U.S. 223 (1978), it held that a five-person jury was not. In each case the Court was guided by the need to draw a line that would preserve the possibility of a representative jury. In *Williams*, the Court indicated that a jury should be large enough "to promote group deliberation, free from outside attempts at intimidation, and to provide a *fair possibility for obtaining a representative cross-section* of the community." 399 U.S. at 100 (emphasis added). In *Ballew*, likewise, the Court expressed concern "about the *ability* of juries truly to represent the community as membership decreases below six," 435 at 242 (emphasis added), and held that "any further reduction . . . that prevents juries from truly representing their communities, attains constitutional significance," *id.* at 239. *See also id.* at 245 (White, J., concurring); *id.* at 246 (Brennan, J., concurring).

Thus, although the Sixth Amendment does not guarantee a representative trial jury, it does guarantee the possibility of a representative jury. It would be odd if the right to a representative jury pool did not reach, in some way or other, into the trial jury, that is, if the Sixth Amendment's reach ended with the first stage of jury selection. If the Sixth Amendment has implications for the jury pool, it can only be because it has some implication for the jury that actually sits at trial. As the Supreme Judicial Court of Massachusetts said in *Commonwealth v. Soares*, 387 N.E.2d 499, 513 (Mass.), *cert. denied*, 444 U.S. 881 (1979):

> It is not enough that there be a representative venire or panel. The desired interaction of a cross-section of the community does not occur there; it is only effectuated within the jury room itself.

Thus, it would be nonsensical if the Sixth Amendment's requirement of representativeness in the jury *pool* were not intended to have some sort of effect in the jury *room*.

If the Sixth Amendment does guarantee something about the trial jury, then, it can only be the *possibility* or *chance* that the various groups that make up a community will be represented on the jury, and that is the conclusion that the Supreme Court drew in *Williams*, 399 U.S. 78, and *Ballew*, 435 U.S. 223. The six-person jury is constitutionally acceptable because it is large enough to allow for the possibility that the jury will be representative; the five-person jury is not acceptable because it does not. The majority cites *Ballew* and *Williams* for the proposition that "merely decreasing the possibility of obtaining a fair cross section of the community on the petit jury does not violate the sixth amendment right to a trial by an impartial jury." *Supra* p. 21. The relevant question, however, is whether the possibility is decreased for a constitutionally permissible reason. Excluding jurors on the basis of race is not a constitutionally acceptable reason for reducing the possibility of a representative jury, and the majority makes no attempt to meet this argument. Race-based peremptory challenges obviously impact upon the *process* of jury selection in a way that reduces the statistical probability of a representative jury. *Fields v. Colorado*, 732 P.2d 1145, 1155 (Colo. Sup. Ct. 1987) ("The right to trial by an impartial jury does guarantee that the possibility of a petit jury in a given case representing a fair cross-section of the community will not be limited arbitrarily by the discriminatory and systematic use of peremptory challenges.").[4]

The majority asserts that in this case "the record is barren of any proof or testimony establishing community prejudice towards Teague." *Supra* p. 21. The crucial

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[4] In *Fields* the Colorado Supreme Court held that a prosecutor's use of peremptory challenges to systematically exclude Spanish-surnamed veniremen from a jury deprives a defendant of his right to an impartial jury under the Sixth Amendment of the federal Constitution.

question, however, is not whether the particular jurors selected were prejudiced against Teague but whether the prosecution used its peremptory challenges to reduce the possibility that blacks would be sitting on the jury, and there is overwhelming evidence that the state did just that. The prosecution and the defense each had ten peremptory challenges. The state exercised every single one of its challenges to exclude a black venireman.[5] After the state had used six of its peremptory challenges and then again after it had used all ten of its challenges, the defense moved for a mistrial on the ground that the state was using its challenges only against black jurors. In responding to the second motion, the state explained that it had excused some of the veniremen because they were very young and that it had excused others because it was attempting to obtain an equal number of men and women. The state appellate court found the prosecution's explanation unpersuasive, 439 N.E.2d 1066, 1069-70, and after examining the manner in which the state exercised its peremptory challenges, I would agree that the state's proffered explanations were pretextual.[6]

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[5] It is true that the defense used one of its challenges to excuse a black; however, the husband of that juror was a policeman and since Teague's trial involved the shooting of a policeman, that decision would seem to be justified on grounds apart from race.

[6] After its first challenge, every juror rejected by the state was a black woman. At that point, at which the only jurors seated were four males, the prosecution had already rejected five black women. It had also accepted three women, ultimately rejected by the defense. It is highly improbable, therefore, that in exercising its first six challenges the state was motivated to exclude women in order to achieve a balance of males and females. Of the next four jurors, all were female; the two whites were accepted by the state and seated; the two blacks were rejected by the state. By the time the tenth juror was seated, seven were male and only three female. Yet the state accepted two males, rejected by the defense, and rejected two black females. The last two women—giving the more or less balanced result of seven men and five women which the state points to in support of its explanation—were added after the state had exhausted its peremptories. In light of this pattern, the state's explanation that it sought to balance men and women is very unpersuasive.

The state also claimed to be excluding jurors of "very young years." The state rejected four jurors who were college or business school students, or recent graduates; all were black women. The systematic exclusion of younger jurors is perhaps as pernicious as the exclusion of blacks; but in any case, this rationale cannot by itself explain the state's action.

When members of a certain group can be excluded from service on a particular petit jury, the negative effect upon defendants who happen to belong to that group is not difficult to imagine; and it will be especially severe where the group suffers from community prejudice. In such circumstances, the defendant may not even have the protection of the prosecutor's usual concern to bring only well-supported cases into court, for the prosecutor will know that the defendant's group will not be represented and that he can count to some extent upon the prejudice of the community. The protection provided by the Sixth Amendment lies in the general requirement that the state cannot interfere with the possibility that the jury will be representative. And it is that requirement that explains the need for the jury pool to be actually representative, which would otherwise be a great mystery. And it is that requirement which demands a process of getting from the jury pool to the trial jury which does not affect unjustifiably the statistical probability of any group's being represented.

Further, in a case of this sort the perception is almost as important as the reality. Knowledge that blacks could be excluded at will by prosecutors trying black defendants, for example, would lead to cynicism among blacks in viewing the jury system. The importance of general confidence in the accuracy and reliability of the penal system—confidence that the guilty tend to be convicted and the innocent tend to be acquitted—should not be underestimated; such confidence is crucial to the deter-

rent effect punishment must have. We do not increase general respect for the law by simply making it easier to get convictions; and we cannot increase the respect a certain group has for the law by simply making it easier to convict members of that group. There must be the accompanying perception that the law operates with some precision, tending to convict all those and only those who are guilty. In the extreme case, the law would convict members of a group arbitrarily or at random; and of course in that case punishment would have no effect at all. But if members of a group that suffers from prejudice can be tried before juries from which fellow group members have been excluded, to some extent convictions may be perceived as attributable to prejudice against the group and therefore arbitrary. To the extent that they are so perceived, the purpose of punishment is defeated.[7]

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[7] A shocking number of defendants [in Illinois had] alleged [as of 1983] that prosecutors used peremptory challenges to exclude black people from the juries that convicted them:

> *People v. Payne* (1983), 99 Ill. 2d 135, 75 Ill. Dec. 643, 457 N.E.2d 1202; *People v. Yates* (1983), 98 Ill. 2d 502 at 540, 75 Ill. Dec. 188, 456 N.E.2d 1369 (Simon, J., dissenting); *People v. Cobb* (1983), 97 Ill. 2d 465, 74 Ill. Dec. 1, 455 N.E.2d 31; *People v. Williams* (1983), 97 Ill. 2d 252, 73 Ill. Dec. 360, 454 N.E.2d 220; *People v. Bonilla* (1983), 117 Ill. App. 3d 1041, 73 Ill. Dec. 187, 453 N.E.2d 1322; *People v. Gosberry* (1983), 93 Ill. 2d 544, 70 Ill. Dec. 468, 449 N.E.2d 815; *People v. Davis* (1983), 95 Ill. 2d 1, 69 Ill. Dec. 136, 447 N.E.2d 353; *People v. Gilliard* (1983), 112 Ill. App. 3d 799, 68 Ill. Dec. 440, 445 N.E.2d 1293; *People v. Newsome* (1982), 110 Ill. App. 3d 1043, 66 Ill. Dec. 708, 443 N.E.2d 634; *People v. Turner* (1982), 110 Ill. App. 3d 519, 66 Ill. Dec. 211, 442 N.E.2d 637; *People v. Teague* (1982), 108 Ill. App. 3d 891, 64 Ill. Dec. 401, 439 N.E.2d 1066; *People v. Belton* (1982), 105 Ill. App. 3d 10, 60 Ill. Dec. 881, 433 N.E.2d 1119; *People v. Dixon* (1982), 105 Ill. App. 3d 340, 61 Ill. Dec. 216, 434 N.E.2d 369; *People v. Gaines* (1981), 88 Ill. 2d 342, 58 Ill. Dec. 795, 430 N.E.2d 1046; *People v. Mims* (1981), 103 Ill. App. 3d 673, 59 Ill. Dec. 369, 431 N.E.2d 1126; *People v. Lavinder* (1981), 102 Ill. App. 3d 662, 58 Ill. Dec. 301, 430 N.E.2d 243; *People v. Clearlee* (1981), 101 Ill. App. 3d 16, 56 Ill. Dec. 600, 427 N.E.2d 1005; *People v. Vaughn* (1981), 100 Ill. App. 3d 1082, 56 Ill. Dec. 508, 427 N.E.2d 840; *People v. Tucker* (1981), 99 Ill. App. 3d 606, 54 Ill. Dec. 646, 425 N.E.2d 511; *People v. Allen* (1981), 96 Ill. App. 3d 871, 52 Ill. Dec. 419, 422 N.E.2d 100; *People v. Bracey* (1981), 93 Ill. App. 3d 864, 49 Ill. Dec. 202, 417 N.E.2d 1029; *People v. Smith* (1980), 91 Ill. App. 3d 523, 47 Ill. Dec. 1, 414 N.E.2d 1117; *People v. Fleming* (1980), 91 Ill. App. 3d 99, 46 Ill. Dec. 217, 413 N.E.2d 1330; *People v. Attaway* (1976), 41 Ill. App. 3d 837, 354 N.E.2d 448; *People v. Thornhill* (1975), 31 Ill. App. 3d 779, 333 N.E.2d 8; *People v. King* (1973), 54 Ill. 2d 291, 296 N.E.2d 731; *People v. Petty* (1972), 3 Ill. App. 3d 951, 279 N.E.2d 509; *People v. Fort* (1971), 133 Ill. App. 2d 473, 273 N.E.2d 439; *People v. Butler* (1970), 46 Ill. 2d 162, 263 N.E 2d 89; *People v. Cross* (1968), 40 Ill. 2d 85, 237 N.E.2d 437; *People v. Dukes* (1960), 19 Ill. 2d 532, 169 N.E.2d 84; *People v. Harris* (1959), 17 Ill. 2d 446, 161 N.E.2d 809.

People v. Payne, 99 Ill. 2d 135, 152-53, 457 N.E.2d 1202, 1210-11 (1983) (Simon, J., dissenting).

> [I]t is an open secret that prosecutors in Chicago and elsewhere have been using their peremptory challenges to systematically eliminate all blacks, or all but token blacks, from juries in criminal cases where the defendants are blacks.

People v. Gilliard, 112 Ill. App. 3d 799, 807, 445 N.E.2d 1293, 1299 (1983) (footnote omitted), *rev'd*, 96 Ill. 2d 544, 454 N.E.2d 330 (1983).

This problem is not unique to Illinois. After the Supreme Court decided *Griffith v. Kentucky*, 107 S.Ct. 708 (1987), which held that *Batson* would be applied retroactively to cases pending on direct state or federal review when *Batson* was decided, the Court granted certiorari in 24 cases from various jurisdictions in which a *Batson* claim was raised, vacated the judgment in each case and remanded for reconsideration in light of *Griffith*.

I think it is beyond dispute, therefore, that although the Sixth Amendment does not give the defendant the right to a representative trial jury, it assures him of the possibility that his jury will contain members of the various groups in his community, a possibility that cannot be

impaired by the exercise of peremptory challenges based solely on the race of the prospective juror.

The majority does not really address why it believes that the exercise of peremptory challenges solely on the basis of a juror's race does not violate the Sixth Amendment. Instead, it seems to rest its opinion on the practical problems involved in restricting the exercise of peremptory challenges. I do not disagree that the peremptory challenge is itself an important guarantor of an impartial jury. The peremptory challenge allows each side to eliminate jurors it suspects, for reasons it cannot articulate or for reasons that do not reach the level of cause, of being partial to the other side. Where challenges are used in that way, the resulting jury should be closer to the ideal of a body without sympathies for either side. Since the selection of juries from the master roll is more or less random, the problem of one-sided sympathies in a group drawn for service on a particular day is not far-fetched. Hence, the peremptory challenge has an important function, along with the challenge for cause, in our rough-and-ready system for arriving at impartiality. The problem I find with the majority opinion is that the Supreme Court in *Batson* has already rejected the argument that the exercise of peremptory challenges cannot be policed without destroying the effectiveness of the challenges. The majority is thus pursuing a contention that is unrelated to any particular constitutional doctrine and which has been thoroughly discredited by the Supreme Court in *Batson*.

I agree with the majority that the problems of maintaining the effectiveness of the peremptory challenge and of relieving the administrative burden on courts are the considerations which led the Court for many years to cling to *Swain*. The Court has now decided, however, that the effectiveness and credibility of the criminal justice system is at stake and these problems which traditionally aroused concern must simply be accepted and solved. This momentous policy decision by the Supreme Court opens the way just as much to reconsideration of the issues under the Sixth Amendment as under the equal protection clause. The "practical" arguments of the majority have already been answered by the highest judicial authority, and I should think they would be considered anachronisms rather than a source of guidance to this court in the post-*Batson* era.

For the foregoing reasons, I respectfully dissent.

SUPREME COURT OF THE UNITED STATES

No. 87-5259

FRANK DEAN TEAGUE,
Petitioner

v.

MICHAEL LANE, Director, Illinois Department of Corrections, *et al.*

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 7, 1988

(6)

No. 87-5259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FRANK DEAN TEAGUE,

Petitioner,

v.

MICHAEL LANE, Director, Illinois Department of Corrections, et al.

Respondents,

On Writ Of Certiorari To The United States Court Of Appeals For the Seventh Circuit

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QUESTIONS PRESENTED FOR REVIEW

Whether a prosecutor's use of peremptory challenges to exclude members of a distinctive group from the petit jury violates the Sixth Amendment fair cross-section requirement.

Whether, consistent with Justice Harlan's view of retroactivity, *Batson* v. *Kentucky* should at a minimum be applied retroactively to all convictions not final when certiorari was denied in *McCray* v. *New York*.

Whether *Swain* v. *Alabama* permits the prosecution's volunteered reasons for its exercise of its peremptory challenges to be examined to determine if it has engaged in racial discrimination.

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OPINIONS BELOW

The en banc opinion of the court of appeals (J.A. 14) is reported at 820 F.2d 832 (7th Cir. 1987). The order vacating the proposed panel opinion and ordering rehearing en banc pursuant to circuit rule 16(e) (J.A. 7) is reported at 779 F.2d 1332 (7th Cir. 1985). The district court opinion denying habeas corpus relief (J.A. 5) is unreported.

JURISDICTION

The judgment of the court of appeals was entered on May 11, 1987. The petition for writ of certiorari was filed on August 10, 1987 and was granted on March 7, 1988. The jurisdiction of this Court rests upon 28 U.S.C. 1254(1).

STATEMENT OF THE CASE

Frank Teague, a black man, was convicted of armed robbery of an A&P supermarket and attempt murder of police officers who were shot at following the robbery. His defense was insanity. *People* v. *Teague*, 108 Ill.App.3d 891, 439 N.E.2d 1066 (1st Dist. 1982) (Campbell, J., dissenting). The jurors selected and sworn to decide the issue of guilt or innocence were white, the prosecution having elected to exercise all ten of the peremptory challenges afforded it by statute, Ill.Rev.Stat., Ch. 38, § 115-4(e), to excuse prospective jurors who were black.

Those excluded jurors included nine women and one man of varying backgrounds and ages. Defense counsel excused a black juror who was married to a police officer. (J.A. 3)

The defense made two motions for mistrial complaining of the prosecutor's exclusion of the black jurors, one after six black jurors had been peremptorily challenged by the State (J.A. 2), and the second at the conclusion of jury

selection. In response to the second motion, the prosecutor represented that he was attempting to achieve a balance of men and women and age groups. He noted defense counsel had used one of his challenges against a black juror and that the prosecution had excused a white juror during selection of the alternates. The trial judge made no finding as to the validity of the State's proffered explanation and merely denied the defense motion. (J.A. 3, 4)

The Illinois Appellate Court declined to grant Teague relief from his conviction because he had failed to demonstrate systematic exclusion of black jurors as was his burden according to *Swain* v. *Alabama*, 380 U.S. 202 (1965). The court refused to recognize any other claimed basis for relief. With respect to the prosecutor's representation that he had exercised his challenges to achieve a balance of men, women and age groups, the court observed "an examination of the record shows that white jurors who fell within the men, women and age groups to which the State referred were not excused peremptorily by the State." *Teague*, 439 N.E.2d at 1069, 1070. Rehearing was denied by the appellate court, the Illinois Supreme Court denied leave to appeal, *People* v. *Teague*, 449 N.E.2d 810 (Ill. 1983) (Simon, J., dissenting) and this Court denied a petition for writ of certiorari. *Teague* v. *Illinois*, 464 U.S. 867 (1983) (Marshall and Brennan, JJ., dissenting).

On March 5, 1984, Teague filed a petition for writ of habeas corpus in the federal district court, complaining his Sixth and Fourteenth Amendment rights were violated by the prosecution's exclusion of black jurors by peremptory challenge. (Petition, p. 4) On August 8, 1984 the district court denied relief and granted Respondents' motion for summary judgment, concluding Teague's claim

was foreclosed by *Swain* and decisions of the court of appeals declining to depart from *Swain*. The court found, however, that Teague's arguments were persuasive. (J.A. 5, 6)

A divided panel of the court of appeals agreed with Teague that the Sixth Amendment does bar use of the peremptory challenge to deprive an accused of the fair possibility of obtaining a representative jury, but its opinion was vacated and the cause set for rehearing en banc pursuant to circuit rule 16(e). *U.S. ex rel. Teague* v. *Lane*, 779 F.2d 1332 (7th Cir. 1985) (Cudahy, J., dissenting). (J.A. 7) After reargument en banc, the court determined that the Sixth Amendment fair cross-section requirement had no application to the petit jury, that the intervening decision in *Batson* v. *Kentucky*, 476 U.S. 79 (1986) had no retroactive application because Teague's conviction was final, and that, assuming it was not procedurally barred, no *Swain* equal protection violation had been demonstrated. *Teague* v. *Lane*, 820 F.2d 832 (7th Cir. 1987) (Cudahy and Cummings, JJ., dissenting). (J.A. 14) On March 7, 1988, this Court granted Teague's petition for writ of certiorari in which all three issues are presented to the Court. (J.A. 54)

SUMMARY OF ARGUMENT

1. *Batson* v. *Kentucky*, 476 U.S. 79 (1986) recognized that a jury cannot perform its function of safeguarding the accused against the arbitrary exercise of power by a prosecutor or judge if citizens are excluded from jury service by the prosecutor's exercise of the peremptory challenge on account of race. This same injury occurs whenever any distinctive group in the community is denied an opportunity to serve on the petit jury, but the *Batson* remedy is limited to those cases where the accused is a member of

the excluded group. No less protection from the exercise of arbitrary power should be afforded to an accused who is not a member of a group excluded from the jury.

Elimination of abuse of the peremptory challenge can be achieved by recognizing that the Sixth Amendment guarantees the accused a jury selected in accordance with procedures that allow a fair possibility for the jury to reflect a cross section of the community. The defendant is not entitled to a jury of any particular composition and no requirement exists that the petit jury mirror the distinctive groups in the population, *Taylor* v. *Louisiana*, 419 U.S. 522 (1975), but the right of the defendant to have his jury drawn from a source fairly representative of the community contemplates the possibility that the petit jury will be similarly representative. Inclusion of distinctive groups in the jury pool has importance because it provides the opportunity for members of those groups to function as petit jurors. Permitting a prosecutor to use the peremptory challenge as a tool to cull distinctive groups from the petit jury would be inconsistent with our democratic heritage, undermine public confidence in the fairness of the criminal justice system by creating the appearance of unfairness, and deny the accused the benefit of the common-sense judgment of the community by impairing the representative character of the jury.

The standards of *Duren* v. *Missouri*, 439 U.S. 357 (1979) can be employed to determine whether the selection of the petit jury comports with the Sixth Amendment. To establish a prima facie case of a violation of the fair cross-section requirement defendant would show 1) the group allegedly excluded is a distinctive group in the community; 2) representation of this group in the community is not fair and reasonable in relation to the number of such persons in the community, i.e., comparison with

census figures indicate it has been disproportionately excluded; and 3) the underrepresentation is attributable to the prosecution's exercise of peremptory challenges, not excusals for cause or chance circumstances inherent in a random selection process. To rebut this prima facie case, the State must show a significant state interest justifies the underrepresentation of the excluded group. This burden would at least require that a neutral explanation for the challenge be offered but would not require justification equivalent to a challenge for cause.

2. Justice Harlan's view of retroactivity was adopted with respect to cases pending on direct review in *Griffith* v. *Kentucky*, 479 U.S. ___, 107 S.Ct. 708 (1987). Application of his analysis of retroactivity to cases pending on collateral review should result in the rule of *Batson* being applied to all cases pending on direct review when certiorari was denied in *McCray* v. *New York*, 461 U.S. 961 (1983). Justice Harlan believed a claim contained in a habeas corpus petition should be judged according to the constitutional standard dominant at the time the conviction became final to perform the function of habeas review of forcing state courts to toe the constitutional mark. With the denial of certiorari in *McCray*, the dominance of the long criticized rule of *Swain* v. *Alabama* 380 U.S. 202 (1965) ended. The constitutional correctness of any conviction which became final thereafter should not be judged by the standards of *Swain*. Extension of the rule of *Batson* to this class of cases would correct any inequity resulting from this Court's postponement of reexamination of the burden defendant would be required to sustain to establish an equal protection violation.

This limited extension of the benefits of *Batson* would not be inconsistent with the result reached in *Allen* v. *Hardy*, 478 U.S. ___, 106 S.Ct. 2878 (1986). Allen's con-

viction was final when certiorari was denied in *McCray*. Application of the three-pronged test of *Linkletter* v. *Walker*, 381 U.S. 618 (1965) to cases pending on direct review when *McCray* signaled a change of law weighs in favor of retroactive application of *Batson*. The rule of *Batson* is designed to eliminate a practice which threatens the ability of the jury to perform its truth-finding function. A prosecutor could not have justifiably relied on *Swain* to practice racial discrimination in jury selection and the impact of retroactive application of *Batson* would be minimal, the number of affected cases being limited.

Justice Harlan was persuaded that new rules should be applied to all nonfinal cases because retroactivity is an essential attribute of judicial decision making and disparate treatment of similarly situated defendants is intolerable. These considerations apply with equal force to convictions which are final. The interests of finality and allocation of resources, which Justice Harlan believed required that a distinction be made between final and nonfinal cases, are inadequate justification for the differential treatment of cases on direct and collateral review. Those interests are adequately protected by the limitation placed on the availability of federal habeas corpus review by *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). Maintenance of a direct/collateral distinction is unnecessary to promote those same interests and should be abandoned.

3. *Swain* v. *Alabama*, 380 U.S. 202 (1965) did not depart from the principle that discriminatory jury selection practices violate the Equal Protection Clause. *Swain* created a presumption that a prosecutor acts for legitimate reasons in exercising his peremptory challenges to preserve the peremptory nature of the challenge. When a prosecutor volunteers his reasons for his exercise of his

peremptory challenge, those challenges need not be presumed to be legitimately exercised in order to avoid limiting the effectiveness of the challenge. The prosecutor's explanation should be examined to determine if the purposes of the challenge are being perverted and racial discrimination is being practiced.

Although no *Swain*-based claim was made in state court, this claim is not barred by procedural default pursuant to *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). Respondents failed to raise this defense when this claim was argued in the district court and the court of appeals. The state court was given a fair opportunity to review the claim and it has obvious merit. Petitioner argued in state court that the prosecutor's explanation for his exercise of his peremptory challenges was a pretext for racial discrimination. The State argued the merits of this claim should be judged by the standards of *Swain*. The state court held *Swain* afforded petitioner no basis for relief. If the defense of procedural default has not been waived in these circumstances, *Cf. Granberry* v. *Greer*, 481 U.S. ___, 107 S.Ct. 1671 (1987), the action of the state court rejecting the claim on its merits allows a federal court to review the claim. *Ulster County Court* v. *Allen*, 442 U.S. 140 (1979).

ARGUMENT

I. THE PROSECUTION'S USE OF THE PEREMPTORY CHALLENGE TO DEFEAT THE POSSIBILITY THAT THE PETIT JURY WILL REPRESENT A FAIR CROSS SECTION OF THE COMMUNITY VIOLATES THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY.

In *Batson* v. *Kentucky*, 476 U.S. 79, 84 n.4 (1986), this Court declined to decide whether the fair cross-section requirement of the Sixth Amendment places any limita-

tion on the prosecution's ability to use peremptory challenges to exclude black persons from jury participation. Although the soundness of extending the fair cross-section requirement to the petit jury was questioned in *Lockhart* v. *McCree*, 476 U.S. 162 (1986), the issue was again not ultimately resolved because the excluded group in issue, Witherspoon-excludables, was not found to be distinctive for fair cross-section purposes. The ten jurors peremptorily excused by the prosecution from Teague's jury were black persons, members of a group this Court in *Lockhart* acknowledged to be distinctive. 476 U.S. at 175. The issue of whether the fair cross-section requirement may be invoked to invalidate the use of peremptory challenges to exclude members of a distinctive group from the petit jury is thus squarely raised in this case.

A. The Remedy For Discriminatory Use Of The Peremptory Challenge Provided by *Batson* v. *Kentucky* Does Not Adequately Protect The Interests Advanced By The Fair Cross-Section Requirement.

Although *Batson* eliminates some abuses of the peremptory challenge, its remedial effect is limited to cases where defendant is himself a member of the excluded group. *Batson*, 476 U.S. at 96. Other abuses of the peremptory challenge could be ended by recognizing that use of the challenge to eliminate the possibility of representation of any distinctive group on the jury, regardless of its relationship to the accused, is abhorrent to the constitutional concept of a jury trial. That defendant is not a member of the excluded group would not bar this Sixth Amendment claim. *Taylor* v. *Louisiana*, 419 U.S. 522, 526 (1975).

There are many contexts in which a prosecutor might attempt to exclude a distinctive group of which defendant is not a member from jury service. Racial issues may be

"inextricably bound up with the conduct of the trial," *Rosales-Lopez* v. *United States*, 451 U.S. 182, 189 (1981), so as to cause a prosecutor to prefer white jurors even though the defendant may himself be white. An example would be where a white civil rights activist is charged with a crime as a consequence of his civil rights activities or where his defense to a criminal charge is that he has been framed by law enforcement officials who are his antagonists. *Cf. Ham* v. *South Carolina*, 409 U.S. 524 (1973) (recognizing racial bias may infect such a trial where defendant is black).

Batson also does not address the issue of exclusion of female jurors from the petit jury where, as is the case in most criminal prosecutions, the defendant is male. Trial technique manuals counsel that as a general rule the male juror is preferable to the female juror. J. Appelman, Preparation and Trial 163-165 (1967); M. Belli, 3 Modern Trials 446 (2d ed. 1981); J. Doherty, Ready For Trial Your Honor 75 (1972); The Prosecutor's Deskbook 373 (Healy and Manak ed. 1971). Women are undesirable because they are "more responsive to emotional appeals, and, at least from a male point of view, are more unpredictable and subject to being deterred from properly voting for conviction by other irrelevant factors" or are a "distracting influence to male jurors—and to counsel." The Prosecutor's Deskbook, *supra*, at 373. Litigants are especially advised to avoid the female juror where the plaintiff, complainant or witness is an attractive woman, on the theory that "women are inordinately cruel to each other." Appelman, *supra*, at 164.

Discerning whether the accused, who may be of mixed or uncertain parentage, is a member of the excluded group, is also a potential dilemma in the application of *Batson* which could be minimized in the Sixth Amend-

ment context. *See People* v. *Crowder*, 161 Ill. App.3d 1009, 1046, 515 N.E.2d 783, 807 (1st Dist. 1987) (Pincham, J., dissenting); *People* v. *Seals*, 153 Ill. App.3d 417, 422, 505 N.E.2d 1107, 1111 (1st Dist. 1987).

In all of these instances it would be intolerable to permit the prosecution to deny members of a cognizable group the opportunity to serve as jurors, a result which would unquestionably be a departure from the jury ideal, merely due to the circumstance that the accused is not, or cannot be precisely characterized as, a member of the excluded group. Such abuse of the peremptory challenge would be ended if it were recognized that exclusion of any distinctive group, regardless of its relationship to the accused, is abhorrent to the constitutional concept of a jury trial.

B. The Sixth Amendment Guarantees The Accused The Selection Of A Petit Jury In Accordance With Procedures Which Provide A Fair Possibility Of Obtaining A Jury Representative Of The Community.

Selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial, although no requirement exists that petit juries actually mirror the community and reflect the distinctive groups in the population. *Taylor*, 419 U.S. at 538. *Taylor* held violative of the fair cross-section rule a special exemption for women, a distinctive group in the community, which eliminated them from the pools for jury service unless they filed a written declaration of a desire to serve. In *Duren* v. *Missouri*, 439 U.S. 357 (1979), a statute allowing women to exempt themselves from pools for jury service upon request was held to offend these same principles.

Neither *Taylor* nor *Duren* assign independent significance to the inclusion of distinctive groups on jury panels

separate from the effect their presence or absence on those panels would have on the composition of the petit jury. The systematic exclusion of a distinctive group from jury panels offends the Sixth Amendment, not because the group is excluded from the pool of jurors, but because its exclusion from that pool operates to exclude its members from the petit jury. Inclusion of a distinctive group provides the opportunity for a jury drawn from that pool to contain representative members of the group. *See McCray* v. *Abrams*, 750 F.2d 1113, 1128-1129 (2nd Cir. 1984), *vacated*, 106 S.Ct. 3289 (1986); *Booker* v. *Jabe*, 775 F.2d 762, 770-771 (6th Cir. 1985), *vacated*, 106 S.Ct. 3289, *aff'd on reconsideration*, 801 F.2d 871 (6th Cir. 1986), *cert. denied*, 107 S.Ct. 910 (1987).

The Sixth Amendment comprehends not merely that distinctive groups in the community not be excluded from the jury pool, but that the jury be selected in accordance with procedures that provide a fair possibility for obtaining a representative cross section of the community on the petit jury. *Williams* v. *Florida*, 399 U.S. 78, 100 (1970); *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 220 (1946). Selection of a jury from a pool drawn from a fair cross section of the community is not an end in itself but contemplates the possibility that the petit jury will be similarly comprised. The fair cross-section requirement would be illusory if any obstacle could be interposed to the representation of a distinctive group on the petit jury as long as the group was not excluded from the venire.

Any procedure, at any stage of jury selection, which denies the opportunity for a distinctive group in the community to participate in the deliberative process must be condemned as a violation of the Sixth Amendment. Trial by jury of less than six persons is unconstitutional because it decreases the opportunity for meaningful and

appropriate representation of a cross section of the community. *Ballew* v. *Georgia*, 435 U.S. 223, 237 (1978). A prosecutor's exercise of the peremptory challenge to exclude a distinctive group poses no less a threat to the possibility of a cross-sectional jury. Allowing a prosecutor to use the challenge to exclude members of a distinctive group, although the group may have been fairly represented in the jury pool, would render the fair cross-section guarantee a nullity.

C. Permitting A Distinctive Group To Be Excluded From The Petit Jury By Use Of The Peremptory Challenge Is Inconsistent With The Constitutional Concept Of A Jury Trial.

That the Sixth Amendment is violated not only when distinctive groups in the community are excluded from the venire or jury pool, but also when those groups are denied the opportunity to participate in the deliberation process as petit jurors, is evident from examination of the same consideration which persuaded this Court in *Taylor* that the constitutional concept of a jury trial comprehends a jury drawn from a fair cross section of the community. Whether the fair cross-section requirement prevents exclusion of a distinctive group from the petit jury as well as from the pool from which that jury is drawn is resolved by examining the function the fair cross-section requirement performs and its relation to the purposes of the jury trial. If the requirement performs a function essential to the purpose of the right to trial by jury, it is an indispensable component of the Sixth Amendment. *Williams*, 399 U.S. at 99, 100. Extension of the requirement that a fair possibility exist that the petit jury will reflect a cross section of the community is not only compatible with, but is mandated by, the constitutional concept of a jury trial.

The right to trial by jury is guaranteed to the criminal accused as a shield against government oppression. *Duncan* v. *Louisiana*, 391 U.S. 145, 156 (1968). Its function is to interpose between the accused and the accuser the common-sense judgment of the community as a hedge against the overzealous and mistaken prosecutor and in preference to the professional or perhaps overconditioned or biased response of a judge. *Williams*, 399 U.S. at 100; *Taylor*, 419 U.S. at 530. The broad representative character of the jury provides an assurance of diffused impartiality. *Thiel*, 328 U.S. at 277 (Frankfurter, J., dissenting).

If this prophylactic purpose is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool, *Taylor*, 419 U.S. at 530, neither can it be served if a distinctive group is excluded from the petit jury by peremptory challenge. In both instances the quality of community judgment represented by the jury is diluted. *Taylor*, 419 U.S. at 535. The counterbalancing of various biases, which is critical to the accurate application of the common sense of the community to the facts of any given case, suffers. *Ballew*, 435 U.S. at 234. As this Court recognizes:

> When any large and identifiable segment of the community is excluded from jury service, the effect is to remove from the jury room qualities of human nature and varieties of human experience, the range of which is unknown and perhaps unknowable. It is not necessary to assume that the excluded group will consistently vote as a class in order to conclude, as we do, that its exclusion deprives the jury of a perspective on human events that may have unsuspected importance in any case that may be presented.

Peters v. *Kiff*, 407 U.S. 493, 503-504 (1972).

Full community participation in the administration of criminal law is also critical to public confidence in the fairness of the criminal justice system. *Taylor*, 419 U.S. at 530. To perform its high function in the best way, justice must satisfy the appearance of justice. *Re Murchison*, 349 U.S. 133, 136 (1954). A jury selection practice which creates the appearance of bias in the decision of an individual case casts doubt on the integrity of the whole judicial process. *Peters*, 407 U.S. at 502, 503. Exclusion from jury service of a large group of individuals, not on the basis of their inability to serve as jurors, but on the basis of some immutable characteristic such as race, undeniably gives rise to an appearance of bias. *Lockhart*, 476 U.S. at 176.

Where a prosecutor employs peremptory challenges to engineer the wholesale exclusion of a distinctive group from a petit jury, public confidence in the integrity of the criminal justice system is shaken and the appearance of unfairness is created. A question will inevitably arise regarding the quality of justice being sought when members of that group are deemed unsuitable for service no matter what their individual characteristics may be.

Exclusion from jury service of otherwise qualified groups is also at war with our basic concepts of a democratic society and a representative government. *Smith* v. *Texas*, 311 U.S. 128, 130 (1940). Our notions of what a proper jury is have developed in harmony with these concepts. *Glasser* v. *United States*, 315 U.S. 60, 85 (1941). It is part of the established tradition in the use of juries as instruments of public justice that the jury be a body truly representative of the community, *Smith*, 311 U.S. at 130, and not the organ of any special group or class. *Glasser*, 315 U.S. at 60. The exclusion of elements of the community from participation contravenes the very idea of a jury composed of the peers or equals of the person whose

rights it is selected or summoned to determine. *Ballew*, 435 U.S. at 237. To disregard the principle that jury competence is an individual rather than group or class matter opens the door to class distinctions and discriminations which are abhorrent to the democratic ideal of trial by jury. *Thiel*, 328 U.S. at 220.

D. Existing Standards May Be Employed To Prove A Violation Of The Fair Cross-Section Requirement.

Duren v. *Missouri*, 439 U.S. 357, 364 (1979) provides standards which may be adapted to determine whether a petit jury has been selected in violation of the fair cross-section requirement of the Sixth Amendment. The defendant must initially establish a prima facie violation of the requirement. He succeeds if he can demonstrate that 1) the group alleged to be excluded is a distinctive group in the community; 2) representation of this group on the petit jury is not fair and reasonable in relation to the number of such persons in the community; and 3) the underrepresentation is attributable to the prosecutor's exercise of his peremptory challenges.

What is a distinctive group within the meaning of the fair cross-section requirement has never been precisely defined other than that the concept of distinctiveness must be linked to the purposes of the requirement and does not include groups defined solely in terms of shared attitudes which either prevent or substantially impair members of the group from performing the duties of a juror. *Lockhart*, 476 U.S. at 174. Because communities differ at different times and places, the concept of what comprises a fair cross section is not immutable and varies according to time or place. *Taylor*, 419 U.S. at 537.

The second prong of the prima facie case may be established by a demonstration that a cognizable group is

underrepresented in proportion to its position in the community as documented by the U.S. census. *Duren*, 439 U.S. at 364.

The third prong requires that the underrepresentation be attributable to specific action of the prosecutor. No demonstration of systematic exclusion of the dimension found in *Duren* need or should be required. The trial court during the selection process can observe if it is the result of chance circumstances inherent in any random selection process, the excusal of a juror for cause, or a party's exercise of peremptory challenges, which interferes with the possibility that the jury will reflect a fair cross section of the community.

To rebut this prima facie case, the State must justify its infringement on the possibility of a representative jury by demonstrating that a significant state interest is manifestly and primarily advanced by its exercise of the challenges which resulted in the disproportionate exclusion of a distinctive group. *Duren*, 439 U.S. at 367-368. This burden would at least require the prosecution to provide a case-related neutral explanation for its exercise of its challenges. *Batson*, 476 U.S. at 98. The prosecutor should be required to point to some aspect of the challenged juror's background or beliefs which provide a reasonable, objective basis to question the juror's impartiality. For example, an adequate state interest might exist where a juror believes a relative has been treated unfairly by the police or prosecution, but insists he could put that belief aside and judge the case to be tried on its own merits. While the juror would not be subject to a challenge for cause, the prosecution's interest in securing jurors in whose fairness it has confidence would provide justification for exclusion of the juror, although the result would be underrepresentation of a cognizable group on the jury.

E. No Significant State Interest Was Served By The Total Exclusion Of Black Jurors From Petitioner's Jury As A Result Of The Prosecution's Use Of Its Peremptory Challenges.

The facts of this case provide a vivid demonstration of the extreme abuse of the peremptory challenge possible should the Sixth Amendment place no limitation on a prosecutor's interference with the possibility that the jury will reflect a cross section of the community. Thirty-six jurors were examined by the trial court in this case from which twelve were selected to try the issue of Teague's guilt or innocence. Of those thirty-six, four were excused for cause. (S.R. 27, 116, 119, 147) The racial identity of the jurors excused for cause is not revealed by the record. Of the remaining thirty-two jurors, eleven, or approximately one-third, are black. The prosecution exercised each of the ten peremptory challenges allotted it by statute to excuse a black juror. The defense also exercised all ten of its challenges, one against a black woman who was married to a police officer. The result was the selection of an all white jury. (J.A. 3-4)

These facts establish a prima facie violation of the Sixth Amendment. The black persons excluded from the petit jury are a group which is recognized as being distinctive within the meaning of the fair cross-section rule. *Lockhart*, 476 U.S. at 175. Since Teague was tried by a jury from which all potential black jurors had been excluded, black jurors were not represented on the jury fairly and reasonably in relation to the number of such persons in the community from which the jury was drawn. Census figures indicate 25.62% of the population of Cook County, the community from which Teague's jury was drawn, was comprised of black persons in 1980. U.S. Bureau of the Census, County and City Data Book (1983). Approx-

imately one-third of the venire from which the petit jury was selected was black. The complete exclusion of black persons from the petit jury was disproportionate to both the percentage of black persons in the community and on the venire. The peremptory challenge was employed to methodically eliminate each and every black person, save one, from the jury. The underrepresentation of black jurors on the petit jury is attributable to the State's exercise of its peremptory challenges.

No significant state interest was advanced to justify the exclusion of black jurors. *Duren*, 439 U.S. at 368. The explanation offered by the prosecutor who selected Teague's jury was that challenges were exercised to achieve a balance of men, women and age groups. (J.A. 3) An examination of the record shows that the explanation offered by the prosecutor for his exercise of his challenges was disingenuous. It was not essential to his stated objective of a balance that the jury be unrepresentative of black citizenry. A chart outlining the sequence of selection of the jurors from among the thirty-two jurors who withstood challenges for cause follows:[1]

	State		Defense		Seated
	Challenge	**Acceptance**	**Challenge**	**Acceptance**	
(1)	black male				
(2)	black female				
(3)		white male	X		
(4)		white female	X		
(5)		white male		X	X
(6)	black female				
(7)		black female	X		
(8)	X			black female	

[1] This chart is adapted from a chart contained in the unissued panel opinion, found in Appendix A, p. 26 of the petition for writ of certiorari.

	State		Defense		Seated
	Challenge	**Acceptance**	**Challenge**	**Acceptance**	
(9)		X		white male	X
(10)		X		white male	X
(11)		white female	X		
(12)			white male		
(13)	X			black female	
(14)	black female				
(15)		white male		X	X
(16)		white male	X		
(17)	black female				
(18)		white male	X		
(19)		white female		X	X
(20)	black female				
(21)		white female		X	X
(22)		X		white male	X
(23)		X		white female	X
(24)		white male		X	X
(25)		white male	X		
(26)		white male		X	X
(27)		white male	X		
(28)	X			black female	
(29)	black female				
(30)		white female		X	X
(31)			white female		
(32)		X		white female	X

The first panel tendered to the State consisted of two men and two women.[2] Although this panel was "balanced" the State promptly challenged a male and a female juror,

[2] The jury was selected in three panels of four jurors each. After the first panel of four jurors was examined by the court, it was tendered to the prosecution for exercise of its peremptory challenges. Other jurors were substituted for challenged jurors. When the State was satisfied with a panel of four jurors, the panel was tendered to the defense for any challenge. Any change in the composition of the panel as a consequence of defense challenges resulted in the panel being retendered to the State for challenge or acceptance. This process continued until both parties agreed to the composition of the panel.

both of whom were black. The State excused three black females during selection of that panel, none of whom it accepted to further achievement of the "balance" it desired. As to the second panel, whose final composition was one male and three females, the State excused two black females, at the same time finding acceptable three white males and three white females. Prior to exercise of any defense challenges against the final panel, the State accepted a panel of four men, which had it been accepted by the defense would have resulted in a jury composed of nine males and three females, which hardly qualifies as a balance of men and women. During selection of that panel, the State excused only two females, both of whom were black. The final two white females on the jury were selected after the State had exhausted its peremptory challenges; their appearance was not the result of the State's design. The suggestion that it was the prosecutor's quest for a balance of men and women on the jury which resulted in the underrepresentation of black jurors has no basis in fact.

The prosecutor's objective of seeking a balance of age groups also is unsupported. Although the record does not reflect the ages of all the jurors, four of the persons who sat on the petit jury had grown children (S.R. 67, 131, 138, 159), two had both school-age and grown children (S.R. 54-55, 71), one had held the same employment for thirty-seven years (S.R. 129), and another was on disability and living with his retired sister. (S.R. 142-144) Two had school-age children and one was a 22 year old student. (S.R. 99, 120, 164) Three of the black jurors excused by the State were students and one was 19. (S.R. 89, 92, 111, 123) The remainder had school-age or grown children or substantial work experience. (S.R. 31, 35, 52, 73, 153, 156) At the time the State excused Ms. Turner

and Ms. Moore, black women who were students, the remaining panel was composed of three white men, all of whom had adult children. (S.R. 55, 67, 68, 71, 92, 96) The only young person who sat on the jury, a 22-year old white female college student, was selected after the State exhausted its peremptory challenges. (S.R. 164) The objective of a balance of age groups was not the cause of the underrepresentation of black jurors because the State never achieved its purported objective, the jury being predominately composed of older persons, and young black jurors were challenged when no younger age groups were represented on the jury. The expressed objective of balance is a belatedly contrived excuse to mask the State's misconduct.

This Court has cautioned that we must be ever vigilant in resisting any tendencies, no matter how slight, toward selecting jurors by any method which would prevent the opportunity for trial by a representative jury. *Glasser*, 315 U.S. at 86. The injury that is prevented is not limited to the defendant, but extends to the jury system, the law as an institution, the community at large, and the democratic ideal reflected in the processes of our courts. *Ballard* v. *United States*, 329 U.S. 187, 195 (1946). Disallowance of the prosecution's use of the peremptory challenge to eliminate minority participation from a petit jury, as was accomplished at the trial of this case, is crucial to preservation of the constitutional concept of jury trial. The accused and the community both deserve a criminal justice system in which they have full confidence.

II. RETROACTIVE APPLICATION OF THE RULE OF *BATSON* V. *KENTUCKY* SHOULD BE EXTENDED AT A MINIMUM TO THOSE DEFENDANTS WHOSE CONVICTIONS WERE NOT FINAL WHEN CERTIORARI WAS DENIED IN *MCCRAY* V. *NEW YORK*.

In *Griffith* v. *Kentucky*, 479 U.S. ___, 107 S.Ct. 708 (1987), the rule of *Batson* v. *Kentucky*, 476 U.S. 79 (1986)

was held to apply retroactively to all defendants whose convictions were not final when the rule was announced. *Griffith* followed the rationale of *United States* v. *Johnson*, 457 U.S. 537 (1982) and *Shea* v. *Louisiana*, 470 U.S. 51 (1985) that applying newly declared constitutional rules to cases pending on direct review is consonant with basic norms of constitutional adjudication and furthers the goal of treating similarly situated defendants similarly, but abandoned the "clear break" exception enunciated in *Johnson*, 457 U.S. at 549, as inconsistent with the principles which persuaded the Court to extend the benefits of new rules to defendants whose convictions are not final.

The reasoning of *Griffith* has its origin in the separate opinions of Justice Harlan in *Desist* v. *United States*, 394 U.S. 244, 256 (1969) (Harlan J., dissenting) and *Mackey* v. *United States*, 401 U.S. 667, 675 (1971) (Harlan, J., concurring and dissenting), in which he proposed a view of retroactivity which distinguished between cases pending on direct and collateral review. This Court has not yet adopted Justice Harlan's view with respect to cases pending on collateral review.[3] If that view or a modified version is adopted here, the benefits of *Batson* should be extended at a minimum to all defendants whose convictions were not final when certiorari was denied in *McCray* v. *New York*, 461 U.S. 961 (1983).[4]

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[3] In *Allen* v. *Hardy*, 478 U.S. ____, 106 S.Ct. 2878 (1986), *Batson* was held non-retroactive to final convictions, but on the ground that application of the three-pronged analysis of *Linkletter* v. *Walker*, 381 U.S. 618 (1965) supported such a result.

[4] On May 31, 1983, certiorari was denied in *McCray* v. *New York*, 461 U.S. 961 (1983). Certiorari was denied in *Teague* v. *Illinois*, 464 U.S. 867 (1983) on October 3, 1983.

A. Because The Rule of *Swain* v. *Alabama* Was Not The Dominant Constitutional Standard When Certiorari Was Denied In *McCray* v. *New York*, *Batson* Should Be Retroactively Applied To All Cases Then Pending On Direct Review.

Justice Harlan believed that claims contained in habeas corpus petitions should be judged according to constitutional standards existing at the time the conviction became final. In his view, the choice of what law should be applied should be made by focusing on the purpose of the writ, *Mackey*, 401 U.S. at 682, which is primarily deterrence, i.e., its threat serves as an incentive for trial and appellate courts to conduct their proceedings in a manner consistent with established constitutional standards. *Desist*, 394 U.S. at 262-263. To perform this function of forcing courts to toe the constitutional mark, habeas corpus petitions need only be judged according to the law prevailing at the time a conviction becomes final. *Mackey*, 401 U.S. at 687.

At the time Teague's conviction became final, the state of the law respecting the limitations on the prosecution's use of its peremptory challenges to exclude members of a racial group was not in repose. The precedential effect of *Swain* v. *Alabama*, 380 U.S. 202 (1965) had been destroyed by the denial of certiorari in *McCray* v *New York*, 461 U.S. 961 (1983). A majority of the Justices (opinion of Stevens, J., joined by Blackmun and Powell, JJ., respecting the denial of certiorari, and Marshall, J., joined by Brennan, J., dissenting) recognized that the issue of whether the Constitution prohibits use of the peremptory challenge to exclude members of a particular group from the jury was an important one which ultimately would be resolved by the Court, but disagreed as to timing. Justice Stevens concluded the issue would be

better addressed by first allowing the states to serve as laboratories in which the issue received further study. Reexamination of *Swain* was intentionally postponed, but the effect was to signal lower courts that *Swain* could be rethought and no longer controlled their resolution of the issue. Since they were cast in the role of laboratories where the law was open to experimentation, *Swain* was not binding authority and lower courts could not determine after *McCray* if they were "toeing the constitutional mark." The resulting inequity[5] can only be corrected by extension of the benefits of *Batson* to all those thus affected.[6]

Justice Harlan recognized that it would often be difficult for a habeas court to define the constitutional standards prevailing at the time a conviction became final. The court would be "required to chart out the proper implications of the governing precedents" rather than simply applying new rules to those cases pending at the time the decision is announced. He believed that simplicity should not be purchased at the cost of compromising the principle that a habeas petitioner is entitled to have his conviction judged according to constitutional standards dominant at the time it became final. *Desist*, 394 U.S. at 268; *Mackey*, 401 U.S. at 695.

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[5] In his petition for writ of certiorari on direct appeal, Petitioner counseled against delay in resolution of the problem of misuse of the peremptory challenge, noting most state courts were reluctant to reexamine *Swain*. *See Gilliard* v. *Mississippi*, 464 U.S. 867, 871 n.3 (1983) (Marshall, J., dissenting).

[6] This class would consist of all defendants whose convictions were not final when certiorari was denied in *McCray* on May 31, 1983 but became final prior to the announcement of the *Batson* rule on April 30, 1986.

The rule of *Swain* cannot be considered the dominant constitutional standard at the time Petitioner's conviction became final in light of the impact of *McCray*. To paraphrase Justice Harlan, "it is hard to believe that any lawyer worthy of the name could, after reading *[McCray]* rely with confidence on the continuing vitality of the *[Swain]* rule. Nor is it by any means clear . . . that it would have been improper for a lower court to have declined to follow *[Swain]* in light of *[McCray.]*" *Desist*, 394 U.S. at 265. Because the dominance of *Swain* ended when certiorari was denied in *McCray*, the constitutionality of Teague's conviction should not be judged according to the standard of *Swain*.

A central concern of Justice Harlan was that rules of retroactivity not unfairly discriminate among similarly situated defendants. He recognized that drawing a distinction between direct and collateral attacks on convictions would result in some discrimination. His willingness to accept this result, in the face of the competing considerations of the need for finality and allocation of limited resources, was premised on the assumption that it could be concluded with assurance that a conviction was perfectly free from error when it became final. *Mackey*, 401 U.S. at 689-691.

No such assurance exists here. The inequity which defendants suffer because their jurisdiction did not provide a remedy for the prosecution's discriminatory jury selection practices cannot be forgiven in the interests of finality or conservation of resources. *McCray* undoubtedly signaled that *Swain* should be reexamined, yet left it entirely to the discretion of lower courts whether to follow precedent that was discredited, although not expressly overruled. Correction of this aberration can be achieved by extension of the benefits of *Batson* to all defendants

whose cases were pending on direct review when the dominance of *Swain* ended.

B. Extension Of The Benefits Of The Rule Of *Batson* To All Cases Pending On Direct Review When Certiorari Was Denied In *McCray* Would Not Be Inconsistent With The Result Reached In *Allen* v. *Hardy*.

Consistency with the result reached in *Allen* v. *Hardy*, 478 U.S. ____, 106 S.Ct. 2878 (1986) does not demand that this Court deny the benefits of *Batson* to defendants whose convictions became final only after denial of certiorari in *McCray*. First, Allen's conviction was final and he was seeking collateral relief from his conviction when the *McCray* denial was announced, *U.S. ex rel. Allen* v. *Hardy*, 556 F.Supp. 464 (N.D.Ill. 1983). The *Allen* Court therefore had no cause to question the vitality of *Swain* while *Allen* was pending on direct appeal.

Second, application of the three-pronged analysis of *Linkletter* v. *Walker*, 381 U.S. 618 (1965) to that class of cases which became final after *McCray* but prior to the *Batson* opinion being delivered would have resulted in the conclusion that the interests considered were weighted in favor of retroactive application of *Batson*.

Foremost among the factors weighed in deciding to whom the benefits of a new rule extend is the purpose of the rule at issue. If the purpose is designed to enhance the accuracy of the trial, retroactivity is favored. Controlling significance is given to the extent of reliance on the old rule and the impact retroactive application of the new rule would have on the criminal justice system only where the purpose of the rule does not clearly favor retroactivity or prospectivity. *Brown* v. *Louisiana*, 447 U.S. 323, 328 (1980); *Solem* v. *Stumes*, 465 U.S. 638, 643 (1984).

That the rule of *Batson* bears on the truth-finding function of a criminal trial is beyond dispute. *Allen*, 106 S.Ct. at 2880; *McClesky* v. *Kemp*, 481 U.S. ____, 107 S.Ct. 1756, 1775 (1987). The rule is not designed to be a mere deterrent nor is its role purely prophylactic. Racial discrimination in the selection of a jury is a stimulant to race prejudice which is an impediment to securing equal justice. It denies the accused the protection against the arbitrary exercise of power by a prosecutor or a judge that a trial by jury is intended to secure. *Batson*, 476 U.S. at 86-88. Being a practice that undermines the jury's ability to perform its function, it poses a significant threat to the truth-finding process. *Brown*, 447 U.S. at 334.

Safeguards do not exist which significantly minimize the likelihood of past injustices caused by discriminatory jury selection. Although this Court has noted the existence of procedures, such as voir dire and the court's instructions, which could protect these same interests, *Allen*, 106 S.Ct. at 2881 n.2, the protection these measures provide is largely illusory. A defendant is unable to question jurors specifically as to racial bias unless he can demonstrate a significant likelihood exists that racial bias will influence a jury. *Ristaino* v. *Ross*, 424 U.S. 589, 596 (1976). A prosecutor inclined to discriminate in the selection of a jury may not limit his misconduct to those cases in which such a demonstration can be made. While a court may direct jurors in concluding instructions not to be influenced by any prejudices they may harbor, such an instruction does not insure that only jurors free from prejudice are selected for jury duty, or that only those sit who are able to arrive at an independent judgment apart from any prejudice they may have. The efficacy of such an instruction is also questionable where those same jurors have witnessed the apparently court-sanctioned spectacle of a jury selected in a race-conscious manner.

While no viable remedy existed to prevent miscarriages of justice as a result of discrimination in the selection of jurors prior to *Batson*, retroactive extension of the benefits of *Batson* would not result in windfall benefits for defendants who have suffered no constitutional deprivation. *Michigan* v. *Payne*, 412 U.S. 47, 53 (1973). Only those defendants able to demonstrate that the prosecutor's use of the peremptory challenge was racially motivated, i.e., who have suffered the injury *Batson* is designed to eliminate, will reap the benefit of retrial.

Retroactive application of *Batson* would also result in the award of relief which would remedy the injury suffered. Unlike other contexts where the interest sought to be protected has been damaged and cannot be corrected, *Linkletter*, 381 U.S. at 637, the injury which occurs when an accused is tried by a jury from which members of his race have been excluded is not irreparable. The confidence of the public and the accused that justice has been done can be restored by trial by a jury selected in a nondiscriminatory manner.

The factors of reliance on the old rule and the impact of retroactive application of *Batson* on the administration of justice do not weigh heavily against retroactivity where the class of potential litigants is limited to cases which were not final when certiorari was denied in *McCray*.[7] Since trial and appellate courts and prosecutors were put on notice by *McCray* that the rule of *Swain* was certainly going to be reexamined by the Supreme Court at some date in the not distant future, a prosecutor's continued reliance on the heavy evidentiary burden of *Swain* was risky. That *Swain* was under continued attack and some

[7] There is no indication that the limited retroactivity given *Batson* in *Griffith* has had any adverse effect.

courts used their own state constitutions or the Sixth Amendment to provide a remedy for discriminatory use of the peremptory challenge notwithstanding *Swain*, diminishes the persuasiveness of the prosecution's reliance on *Swain*. *Roberts* v. *Russell*, 392 U.S. 293, 295 (1968). *Swain* left unquestioned the principle established in *Strauder* v. *West Virginia*, 100 U.S. 303 (1880), that the state denies a black defendant equal protection of the laws when it places him on trial before a jury from which members of his race have been purposefully excluded. *Batson*, 476 U.S. at 89. A prosecutor could not have justifiably relied on *Swain* as sanctioning discriminatory jury selection practices. *Batson*, 476 U.S. at 101 (White, J., concurring). Even if a prosecutor believed the evidentiary burden of *Swain* controlled, a defense of his exercise of his challenges remained a possibility which had to be anticipated should a defendant question a prosecutor's motives and undertake to carry his burden of proof. In short, no prosecutor could or should have believed that race was a proper basis to exercise a peremptory challenge or that his conduct was immune from scrutiny under *Swain*.

Nor is the impact on the administration of justice great due to the limited number of cases involved. Retrial will not be required in every instance in which a defendant claims he is entitled to the benefits of *Batson*, only in those instances in which he can persuade the trial court that discrimination has occurred. Further winnowing will occur with application of various state or federal procedural rules which limit the number of successful litigants. *Hankerson* v. *North Carolina*, 432 U.S. 233, 244 n.8 (1977).

C. No Reasoned Basis Exists To Extend The Benefits Of The *Batson* Rule To Litigants In Cases Pending On Direct Review And To Deny Relief To Equally Deserving Litigants Who Are Seeking Collateral Relief From Their Convictions.

Justice Harlan was convinced that new constitutional rules must at a minimum be applied to cases pending on direct review when the rule is announced. To hold otherwise in his view would constitute an indefensible departure from the model of judicial review, allowing the Court to simply fish one case from the stream of appellate review, use it as a vehicle for pronouncing new constitutional standards, and then permit a stream of similar cases to flow by unaffected by that rule. *Mackey*, 401 U.S. at 679. By picking and choosing whom among similarly situated defendants should receive the benefits of a new rule, the Court acts as a legislature or court of revision, not a court of law. *Desist*, 394 U.S. at 259; *Mackey*, 401 U.S. at 677-679.

The conviction that retroactivity is an essential attribute of judicial decision making and that disparate treatment of similarly situated defendants is intolerable should not dissipate merely because a defendant is pursuing an avenue of relief beyond direct appeal. This Court was persuaded to reject the "clear break" exception to the rule of retroactivity due to recognition that the "mere fortuities of the judicial process" should not be the basis for distinguishing whom among equally deserving litigants receive the benefits of a new rule. *Griffith*, 107 S.Ct. at 716. Neither should the direct/collateral distinction be maintained where it is the "vagaries of the appellate process" which unavoidably create inequities in availability of relief. *Johnson*, 457 U.S. at 567-568 (White, J., dissenting).

Considerations of finality do not justify the distinction between direct and collateral review. A new trial is not a significantly less burdensome remedy when it is imposed on direct review than when it is ordered on habeas. *Shea*, 470 U.S. at 64 n.1 (White, J., dissenting). The line drawn between direct and collateral review is purely arbitrary. *Johnson*, 457 U.S. at 567 (White, J., dissenting). It allows for no exception to the general rule of nonretroactivity for state collateral proceedings where the state court should itself determine whether its interests in finality of its judgments supply justification to deny extension of the benefits of a new rule to a defendant seeking state post-conviction relief.

Justice Harlan found the interests of finality significant only because he found disquieting the rule of *Fay* v. *Noia*, 372 U.S. 391 (1963) which "opened the door for large numbers of prisoners to relitigate their convictions each time a 'new' constitutional rule was announced" despite the fact that the new rule had not been suggested in the original proceedings. *Desist*, 394 U.S. at 261. Finality became paramount only as it provided a means to contain the effect of decisions Justice Harlan believed "constitute an unsound extension of the historic scope of the writ and an unfortunate display of insensitivity to the principles of federalism which underlie the American legal system." *Mackey*, 401 U.S. at 685. It was the availability of relief on habeas review to prisoners raising new claims never addressed by state courts which Justice Harlan believed frustrated the state's interests in finality.

Developments since *Fay* v. *Noia*, however, have eliminated the specter of prisoners continually relitigating the constitutionality of their convictions each time a new rule is announced. Extension of the benefits of a new rule to habeas corpus petitioners does not entitle them to those

benefits if the interests of comity and finality would otherwise be disserved. Those interests are addressed by the rule of *Wainwright* v. *Sykes*, 433 U.S. 72 (1977), that a state procedural default bars federal habeas corpus review absent a showing of cause for noncompliance with a state procedural rule and a showing of actual prejudice. See *Engle* v. *Issac*, 456 U.S. 107, 134 n.43 (1982) (recognizing that a distinction exists between the retroactive availability of a constitutional decision and the right to claim that availability after a procedural default).

The cause and prejudice test of *Wainwright*[8] addresses the concern that interests of comity and finality are not adequately respected when prisoners are awarded relief from their convictions on the basis of constitutional rules announced after their convictions become final. Construction of an artificial dividing line between direct and collateral review is unnecessary to promote those same interests and should be abandoned.

III. *SWAIN* V. *ALABAMA* PERMITS A PROSECUTOR'S VOLUNTEERED EXPLANATION FOR HIS EXERCISE OF HIS PEREMPTORY CHALLENGES TO BE EXAMINED TO DETERMINE WHETHER THE EXPLANATION IS LEGITIMATE OR A MERE PRETEXT FOR RACIAL DISCRIMINATION.

If *Batson* v. *Kentucky*, 476 U.S. 79 (1986) has no retroactive application to cases pending on collateral review, Teague is entitled to relief from his conviction nonetheless

[8] Additional limitations on the availability of collateral relief are found in *Stone* v. *Powell*, 428 U.S. 465 (1976), the exhaustion of state remedies requirement, *Rose* v. *Lundy*, 455 U.S. 509 (1982), and the presumption of correctness of state court findings, *Sumner* v. *Mata*, 449 U.S. 539 (1981), all of which promote respect for the finality of state court judgments.

because the record demonstrates an equal protection violation pursuant to *Swain* v. *Alabama*, 380 U.S. 202 (1965). Although he was not required to do so, the trial prosecutor in this case volunteered his reasons for the exercise of his peremptory challenges. *Swain* permits those reasons to be reviewed to determine whether the purpose of the peremptory challenge is being perverted. *Weathersby* v. *Morris*, 708 F.2d 1493, 1496 (9th Cir. 1983), *cert. denied*, 464 U.S. 1046 (1984); *Garrett* v. *Morris*, 815 F.2d 509, 511, 513 (8th Cir. 1987), *cert. denied*, 108 S.Ct. 233 (1987). The explanation offered by the prosecutor for his decision to exercise all ten of his challenges to exclude only black venirepersons from the petit jury was a pretext for racial discrimination. This equal protection violation should be recognized as affording a basis to award Teague relief from his conviction.

A. An Equal Protection Violation Can Be Established Consistent With *Swain* Other Than By Proof That The Prosecution Consistently And Continuously Excluded A Racial Group From Petit Juries.

The court of appeals interpreted *Swain* to require that a defendant meet his burden of demonstrating the prosecution exercised its peremptory challenges in violation of the Equal Protection Clause by proof that black jurors are systematically excluded from petit juries in case after case. The court rejected the notion that a demonstration that the prosecution exercised its peremptories on the basis of race in a single case could establish an equal protection claim. *Teague* v. *Lane*, 820 F.2d 832, 834 n. 6 (1987). *Swain* does not contain the limitations ascribed to it by the court of appeals.

Swain did not question the soundness of the principle enunciated in *Strauder* v. *West Virginia*, 100 U.S. 303 (1880) that a state's purposeful or deliberate denial to

blacks on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause. *Swain*, 380 U.S. at 205. After reviewing the purpose of the peremptory challenge system and the function it serves, the court did conclude a presumption should exist in any given case that the prosecutor uses his challenges to obtain a fair and impartial jury to try the case before the court. This presumption could not be overcome and the prosecutor required to justify his challenges merely by allegations that in a single case the prosecutor removed all blacks from the jury or that they were removed because they were black. *Swain*, 380 U.S. at 222. The presumption might be overcome by proof that

> the prosecutor in a county, in case after case, whatever the circumstances, whatever the crime and whoever the defendant or victim may be, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes serve on petit juries,

but evidence that no black person served on a petit jury over an extended period of time would not satisfy this burden. *Swain*, 380 U.S. at 223. Absent from such proof would be a showing of the prosecution's responsibility for the exclusion. *Swain*, 380 U.S. at 227.

Swain contains no rejection of the possibility that a defendant might demonstrate an equal protection violation by a prosecutor's use of peremptory challenges in a single case. *Swain* merely clothed the prosecution's use of its challenges in a presumption of correctness, insulating them from inquiry except where that presumption was overcome, and rejected the argument that the presumption could be overcome solely by an allegation that the prosecutor peremptorily removed all the black jurors or

that he did so on account of race. That it was not the intent of *Swain* to require proof of a consistent exclusion of blacks over a period of time as the only means to overcome the presumption is evident from the observation of the author of *Swain* that it would not have been inconsistent with *Swain* for the trial judge to invalidate peremptory challenges of black jurors if the prosecutor, in response to an objection to his strikes, stated that he struck blacks because he believed they were not qualified to serve as jurors. *Batson*, 476 U.S. at 101 n.* (White, J., concurring). *Batson* attributed the requirement that the presumption of correctness be overcome by proof of repeated striking of blacks over a number of cases to lower court interpretation of *Swain*. 476 U.S. at 92. Nothing in *Swain* suggests that proof of repeated strikings is the sole or exclusive method of making the requisite showing of perversion of the peremptory challenge.

When a prosecutor volunteers his explanations for his peremptory challenges, the considerations which persuaded the Court to presume that a prosecutor acts for valid reasons in exercising his challenges no longer obtain. The peremptory nature of the challenge was thought worthy of preservation because it enabled the parties to select jurors with the ability to decide the case on the basis of the evidence before them. *Swain*, 380 U.S. at 219. If a prosecutor's motivation for each challenge was subject to scrutiny, a great many uses of the challenge would be banned. *Swain*, 380 U.S. at 222. The Court was not prepared to make this sacrifice.

If the prosecution reveals its motivation for its challenges without compulsion, no deleterious limitation has been placed on the exercise of its challenges. The prosecution remains free to exercise its challenges as it sees fit on the ground of any real or perceived bias detected in a

juror. It is unnecessary to presume that the prosecution exercises its challenges for acceptable reasons to allow it to act on the basis of real or imagined partiality which is incapable of articulation or not easily articulated. The prosecution has determined that its motivation is articulable and it has not been intimidated by the prospect of being forced to state its reasons to be unduly conservative in its exercise of its challenges.

The principle that the Equal Protection Clause is offended when black persons are excluded from participation as jurors on account of race is unassailable. No reason exists to decline to examine the reasonableness and sincerity of a prosecutor's explanation for the exercise of peremptory challenges where it is volunteered. The court should satisfy itself that the prosecutor's challenges are based on constitutionally permissible trial-related considerations and that the proffered reasons are genuine and not merely a pretext for discrimination.

B. The Explanation Volunteered By The Prosecutor For His Peremptory Challenge Of Ten Black Jurors Is A Pretext And Demonstrates That The Prosecutor's Actual Motivation Was Racial Discrimination.

An examination of the reason volunteered by the prosecutor for his exercise of his peremptory challenges in Teague's case reveals that the proffered explanation was a pretext, intended to disguise his actual motivation which was to obtain a jury as nearly composed solely of white jurors as the prosecutor's manipulative use of his challenges would permit. As demonstrated in Argument I, *supra*, the record affirmatively refutes the contention that the stated objective that the jury reflect a balance of men, women and age groups resulted in the exclusion of black jurors.

Additional support is found for this conclusion in the prosecutor's decision not to strike white jurors who differed in no significant way from the excluded black jurors. *Garrett*, 815 F.2d at 514.[9] Both Mrs. Munoz and Ms. Jones were employed, had two school-age children and had no jury or psychiatric experience. (S.R. 120-121, 156-157) The prosecutor excused only Ms. Jones, who is black. Mrs. Hall was the victim of an unsolved crime and was employed. (S.R. 28, 29, 35) Mrs. Hook was employed and her father was the victim of an unsolved crime. (S.R. 125-126) The prosecutor excused only Mrs. Hall, who is black. Ms. Hefferman, who was separated from her husband, employed, had school-age children and experience with psychiatrists, was acceptable to the State. (S.R. 36, 45) Ms. Jones, who was divorced, employed and had school-age children (S.R. 155, 156), and Mrs. Hampton, who had used the services of a psychiatrist (S.R. 53), were not. Only Ms. Jones and Mrs. Hampton are black. Mrs. Knoeizer and Ms. Winston were both employed, married, had employed husbands and at least one grown child (S.R. 152-153 79-80), but the prosecutor was dissatisfied only with Ms. Winston, who is black.

These facts support the conclusion that the explanation proffered by the prosecution was a pretext for purposeful discrimination. Such discrimination has not been tolerated since *Strauder* and *Swain* offers the prosecutor no protection from the consequences of his misconduct.

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[9] The state appellate court also observed that "an examination of the record shows that white jurors who fell within the men, women and age groups to which the State referred were not excused peremptorily by the State." *People* v. *Teague*, 108 Ill. App.3d 891, 439 N.E.2d 1066, 1069-1070 (1st Dist. 1982).

C. The Failure Of Petitioner To Raise His *Swain* Claim In State Court Does Not Bar That Claim As A Ground For Relief On Collateral Review Where It Was Fairly Presented To The State Court And Rejected On Its Merits.

Although Teague made no argument in state court that he was entitled to relief pursuant to *Swain* v. *Alabama*, the court of appeals is not correct that this argument is barred by procedural default pursuant to *Wainwright* v. *Sykes*, 433 U.S. 72 (1977). *Teague*, 820 F.2d at 834 n.6. *Weathersby* v. *Morris* was cited to both the district court and the court of appeals as providing a basis to award Teague relief. Respondents did not assert in their response to this argument that a procedural default barred this claim. Their failure to raise this defense constitutes a waiver because the merits of Teague's claim are evident and the state court did review in the context of *Swain* the complaint that the prosecutor had made discriminatory use of the peremptory challenge. *Cf. Granberry* v. *Greer*, 481 U.S. ___, 107 S.Ct. 1671 (1987) (failure of the State to raise the defense of exhaustion of state remedies requires the court to determine whether the interests of comity and federalism would be better served by enforcement of exhaustion requirement).

Moreover, the state court rejected a *Swain* claim on its merits. Petitioner argued to the state appellate court that the prosecutor's proffered explanation for exercise of its challenges was not genuine because no basis existed to distinguish between the ten excluded black jurors and those jurors whom the prosecutor found acceptable except for race. (Appellant's Brief, pp. 80-82) The State argued *Swain* was the "definitive United States Supreme Court case in the area." (Appellee's Brief, p. 19) The appellate court acknowledged that "white jurors who fell within the men, women and age groups to which the State

referred were not excused peremptorily by the State" but rejected Teague's claim because he had failed to sustain his burden of proof pursuant to *Swain*, declining to adopt any representative cross-section requirement as placing too great a limitation on the peremptory challenge. *People* v. *Teague*, 108 Ill. App.3d 891, 439 N.E.2d 1066, 1069-1070 (1st Dist. 1982).

Although Teague did not argue that the state court should examine the record and determine whether an equal protection violation had been demonstrated pursuant to *Swain*, the state court resolved the issue as if he had. The state court found no basis for relief pursuant to *Swain*, overlooking Teague's failure to request that the record be evaluated in light of *Swain*. The state court having decided the issue on its merits despite the lack of preservation, a federal court may also reach the merits of the issue without a showing of cause for the procedural default and prejudice. *Ulster County Court* v. *Allen*, 442 U.S. 140, 149 (1979); *Thomas* v. *Blackburn*, 623 F.2d 383 (5th Cir. 1980).

The State urged the state court to judge Teague's claim on its merits in the context of *Swain*. The state court concurred, holding *Swain* dispositive. Other courts presented with an argument that a prosecutor exercised his peremptory challenges in an unconstitutional manner similarly resolved the issue, no matter in what form it was presented, by citing to *Swain* as the controlling authority. *See State* v. *Ucero*, 450 A.2d 809 (R.I. 1982); *Commonwealth* v. *Henderson*, 497 Pa. 23, 438 A.2d 951 (1981); *State* v. *Grady*, 93 Wis. 1, 286 N.W.2d 607 (Wis. App. 1979); *State* v. *Thompson*, 276 S.C. 616, 281 S.E.2d 216 (1981); *Gaines* v. *State*, 404 So. 2d 557 (Miss. 1981). These events suggest that the two claims, one based on the fair cross-section requirement and the other on the Equal

Protection Clause, when made in the context of a prosecutor's exclusion of a racial group from a jury, may be so factually and logically related that the raising of one affords the state court a fair opportunity to consider both. *Williams* v. *Holbrook*, 691 F.2d 3, 8 (1st Cir. 1982). The interrelationship evidenced by the responses of litigants and courts to complaints of a prosecutor's abuse of the peremptory challenge supports the conclusion that the presentation of the complaint on an alternative constitutional theory provides the state court with a sufficient opportunity to address the merits of the equal protection claim.

All that is required to provide a state court with a fair opportunity to apply constitutional principles and correct any constitutional error committed by the trial court is that the substance of the habeas claim be presented to the state court. It is not enough that all of the facts necessary to support the federal claim were before the state court, but is sufficient if the claim is presented in such a way as to fairly alert the state court to any applicable constitutional grounds for the claim. *U.S. ex rel. Sullivan* v. *Fairman*, 731 F.2d 450, 453 (7th Cir. 1984). Here the state court was presented with more than just the factual basis for the claim. The prosecution alerted the court to the equal protection theory and the court adopted that theory in reaching the claim and rejecting it on its merits. To allow the federal habeas court to utilize that same theory to award relief to Teague would imply no disrespect for the state court. *Ulster County Court*, 442 U.S. at 154. Teague's failure to himself urge the state court to disapprove the prosecutor's conduct as an equal protection violation creates no obstacle to this Court's resolution of the issue.

CONCLUSION

Wherefore, petitioner prays that the judgment of the court of appeals be reversed and the cause be remanded with directions that petitioner be released from custody or that a hearing be conducted to determine whether the prosecution made constitutionally permissible use of its peremptory challenges.

Respectfully submitted,

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No. 87-5259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FRANK DEAN TEAGUE,

Petitioner,

vs.

**MICHAEL LANE, Director,
Department of Corrections, et al.,**

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENTS

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QUESTIONS PRESENTED FOR REVIEW

1. Whether application of the representative cross-section principle to the petit jury so as to restrict the use of peremptory challenges is unworkable and unsound?

2. For purposes of the retroactivity doctrine, should the date of the announcement of a new rule of constitutional law be the controlling event, rather than some preceeding event, and is the retroactive application of the rule of *Batson v. Kentucky* to cases in which the conviction became final before the decision unwarranted?

3. Is petitioner barred by procedural default from pressing his argument that a violation of *Swain v. Alabama* is shown on the record in this case, and if not, does *Swain* permit the use of peremptory challenges to excuse members of a cognizable racial group for trial-related reasons in an individual case where the defendant is a member of the group?

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No. 87-5259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FRANK DEAN TEAGUE,

Petitioner,

VS.

MICHAEL LANE, Director, Department of Corrections, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE RESPONDENTS

CONSTITUTIONAL PROVISIONS INVOLVED

United States Constitution
Amendment VI

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defence.

United States Constitution
Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

On the evening of February 5, 1977, petitioner entered an A & P supermarket in Oak Park, Illinois, armed with a pistol, and committed a robbery. As he left the store, he was confronted by two police officers who were responding to a radio broadcast reporting an armed robbery in progress. One of the officers identified himself and

ordered petitioner to halt. Petitioner drew a gun and fired at the officers, and then fled. Both officers chased petitioner on foot. Shots were exchanged, and petitioner wounded one of the officers in the leg. He was eventually apprehended by a third officer responding to the call. *People v. Teague*, 108 Ill. App. 3d 891, 439 N.E.2d 1066, 1073 (1st Dist. 1982), *cert. denied*, 464 U.S. 867 (1983).

Petitioner's insanity defense was unsuccessful, and he was convicted of armed robbery and attempted murder. The trial court sentenced him to concurrent terms of 30 years. 439 N.E.2d at 1068.

On direct appeal, petitioner raised, among others, a claim that the prosecutor's use of peremptory challenges to excuse ten black prospective jurors, with the result that no blacks were on the jury that tried the case, violated his rights to due process and a jury representative of the community under the Sixth and Fourteenth Amendments to the federal Constitution. Relying on its own prior determination that the Sixth Amendment cross-section requirement does not apply at the petit jury stage, the appellate court rejected this claim. 439 N.E.2d at 1069-71.

Petit jury selection procedures in Illinois are governed by statute and by Supreme Court Rules. In all criminal cases, a jury of twelve must be selected, *Ill. Rev. Stat.* 1977, ch. 38, §115-4(b), and the jurors are examined and passed upon in panels of four, with the prosecution using its challenges first and the parties alternating thereafter. Supreme Court Rule 434(a). In a case such as this one, where imprisonment is a possible penalty, each side is allowed ten peremptory challenges. *Ill. Rev. Stat.* 1977, ch. 38, par. 115-4(e). Pursuant to Supreme Court Rule 234, the trial court elected in this case to conduct the voir dire examination himself. (R. Supp., 3)

During the course of jury selection, defense counsel moved for a mistrial on the ground that the prosecutor had used each of his first six peremptory challenges to excuse black jurors. The motion was denied at the time, but it was renewed at the conclusion of jury selection, when defense counsel alleged that all ten of the prosecutor's peremptory challenges had been used to excuse black jurors. In response to the motion, the prosecutor explained that he used his challenges to excuse younger members of the venire, and to obtain a balance of men and women. The motion was again denied. (J.A. 2-4)

On review of petitioner's application for a writ of habeas corpus, a divided en banc Court of Appeals held that (1) the cross-section requirement of the Sixth Amendment afforded no basis for granting relief because it does not apply at the petit jury selection stage so as to restrict the use of peremptory challenges; (2) *Batson v. Kentucky*, 476 U.S. 79 (1986), which was decided after petitioner's conviction became final, does not apply retroactively to cases on collateral review; and (3) that review of petitioner's argument concerning the applicability of *Swain v. Alabama*, 380 U.S. 202 (1965) to his case was barred by procedural default and was without merit. (J.A. 14-53) On March 7, 1988, certiorari was granted to review all three determinations. (J.A. 54)

SUMMARY OF ARGUMENT

I. Thirteen years ago, this Court held in *Taylor v. Louisiana*, 419 U.S. 522 (1975) that the Sixth Amendment right to trial by jury includes the right to a jury selected from a representative cross-section of the community. Three times since then, this Court has been asked to ex-

tend the cross-section requirement to the petit jury so as to impose restrictions on the use of for-cause or peremptory challenges, and three times it has refused, stating in *Lockhart v. McCree*, 476 U.S. 162 (1986) that such an extension would be unworkable and unsound. Petitioner argues that adoption of such an extension follows from what this Court has said about the purpose of the requirement and its relation to the purpose of the jury. This argument ignores the significant difference between the process of selecting prospective jurors for all cases and the process of selecting petit jurors to try a particular case. Moreover, extension of the cross-section requirement would destroy the value of the peremptory challenge and seriously undermine the ability of both the prosecution and the defense to select fair and impartial jurors. Finally, such an extension is unworkable because the standard petitioner proposes for enforcing the cross-section requirement at the petit jury stage does not promote the principle he invokes.

A. In the first two steps involved in selecting a petit jury, establishing a pool of eligible persons and drawing a venire, the selection criteria are general. Minimal qualification is all that is required. In the next two steps, the exercise of for-cause and peremptory challenges after voir dire examination, the criteria are very specific, because the ability of prospective jurors to be impartial in the context of a specific case is being evaluated. While this Court has long recognized the value of broad-based community involvement in the grand and petit jury system, it has never required that the diversity of the community be reflected beyond the pool and venire stages, and has been careful to emphasize that the cross-section principle provides no right to a petit jury of any particular composition. However, following *Taylor*, some state and federal jurisdictions have held, largely in reliance on this Court's

decisions, that the cross-section principle must be applied at the petit jury stage in order for it to be effectuated, and that the use of peremptory challenges must be restricted accordingly. Many more state and federal jurisdictions have rejected this approach. The cross-section requirement serves its purpose at the pool and venire stages by insuring that no distinctive group can be declared *a priori* unfit for jury service. Thus, no group may be officially branded as inferior, and the jury, as an institution, is not made the organ of a special class. Furthermore, the requirement that jury pools be representative and venires drawn at random insures that the composition of the venire cannot be known before the decision to charge an offense is made, and thus the cross-section requirement serves to discourage the corrupt or overzealous prosecutor from bringing unfounded charges. Petitioner's argument that the prophylactic purpose of the jury is thwarted by the peremptory excusal of members of a distinctive group just as if the group had been excluded from the venire is an argument that affirmative steps must be taken to produce cross-sectional petit juries, something this Court has often said is an impossible and undesirable goal. Moreover, this Court's decisions do not support the argument that any procedure, at any stage of the selection process, which may detract from the possibility provided by the random draw of obtaining a cross-sectional jury violates the Sixth Amendment. Rather, this Court has acknowledged that cross-sectional values, while important, are not always paramount. The impact extension of the cross-section requirement would have on the peremptory challenge, and on the overall fairness of the jury system, must therefore be considered.

B. If the cross-section requirement is extended to the petit jury, it must be assumed that the considerations which define a cognizable group would be the same as

when the composition of the pool or venire is examined, because any arbitrary limitation on what groups may be considered cognizable is inconsistent with the principle. Cognizability is a question of fact, depending on sufficient numbers and distinctiveness of the members of a group at a given place and time, and thus the types of groups which may be cognizable is potentially limitless, and the determination of cognizability may require an extensive evidentiary hearing. Also, if extension of the cross-section requirement is necessary to insure a jury which is fair and satisfies the appearance of fairness, then the use of peremptory challenges by the defense must also be restricted because both sides are entitled to a fair trial. Extension of the cross-section requirement would therefore limit the use of peremptory challenges to an infinitely greater degree than does the Equal Protection Clause as construed in *Batson v. Kentucky*, 476 U.S. 79 (1986). It would prohibit their use, by both sides, for all but frivolous reasons or the most palpable manifestations of individual bias, and this is inconsistent with this Court's recognition in *Batson* of the important role played by the peremptory challenge. The challenge permits the elimination of extremes of partiality at both ends of the spectrum, and whenever group membership correlates with partiality for purposes of the issues involved in a particular case, the challenges of one side or the other will be directed at that group to some degree. In such a case, the peremptory challenge promotes impartiality, the core guarantee of the Sixth Amendment, while rigid adherence to cross-sectionalism dissipates impartiality. Extension of the cross-section requirement would therefore destroy the value of the peremptory challenge and detract from jury impartiality.

C. The standard proposed by petitioner for enforcing the cross-section requirement at the petit jury stage is

not only significantly different from the standard proposed by *amicus*, both differ from the standard used in the jurisdictions that have adopted the extension argument. None of these standards promotes the cross-section principle. Petitioner proposes that a prima facie case can be established by showing that (1) the excluded group is a cognizable group; (2) representation of the group on the petit jury is not fair in relation to its numbers in the community; and (3) the underrepresentation is due to the prosecutor's use of peremptory challenges. The inclusion of a proportionality element in this standard means one of two things. Either group-based peremptory challenges are permissible once proportional representation is achieved, in which case the fundamental premise of the extension argument as set forth in the cases which adopt it is false; or the real aim of petitioner's position is to acquire a right to a jury of a particular composition, consisting of a proportionate number of jurors who are members of one or more groups he deems partial to him. The standard proposed by *amicus* similarly focuses on proportionality, but seeks comparison of the percentage of group members left on the venire after the prosecutor's challenges with their proportion in the community, and does not propose examination of the petit jury at any point. Thus, much litigation could take place over the use of challenges even though the group in question is overrepresented on the petit jury. The standard used in other jurisdictions does not contain a proportionality element, and its purpose is to eliminate all group-based peremptory challenges. However, this leads to reversal of convictions in the name of cross-sectionalism even if the jury actually chosen is a perfect mirror of the community.

II. Petitioner's argument that retroactive application of *Batson v. Kentucky*, 476 U.S. 79 (1986) should be determined as of the time of the denial of certiorari in *McCray*

v. New York, 461 U.S. 961 (1983), or alternatively, that all new constitutional rules should be fully retroactive, is insupportable under any of the views on retroactivity expressed by this Court.

A. The denial of certiorari in *McCray* did not foreshadow the result in *Batson* because the opinion respecting the denial of certiorari and the dissenting opinion discuss the developments in Sixth Amendment jurisprudence following *Swain v. Alabama*, 380 U.S. 202 (1965), but *Batson* was decided on equal protection grounds. By the same token, the opinions in *McCray* did not destroy the precedential effect of *Swain*, and even those courts that accepted the invitation extended in *McCray* to serve as laboratories did not dispute that *Swain* remained the dominant equal protection precedent. To suggest that *McCray* had the impact petitioner attributes to it for retroactivity purposes is to suggest that the opinions accompanying the denial of certiorari establish a more significant watershed in constitutional law than a subsequent decision expressly overruling a prior precedent. Moreover, petitioner's argument that a third category of cases should be created for purposes of *Batson* retroactivity, consisting of cases in which the conviction became final after *McCray* but before *Batson*, is unsound. This argument seeks to attribute to *McCray* a significance which, although not decisive, should nevertheless have some impact on the question of retroactivity. No reason is given as to why this should be so.

B. The present debate on the doctrine of retroactivity is between two competing theories: Justice Harlan's view that all new rules of constitutional law should be retroactively applied to all non-final cases at the time of the decision, but, with two narrow exceptions, not to cases on collateral review; and the view that the three-part test of *Linkletter v. Walker*, 381 U.S. 618 (1965) should apply.

Under either approach, retroactive application of *Batson* to cases on collateral review at the time of the decision is unwarranted. Petitioner's contention that new rules of constitutional law should be fully retroactive is not supported by any decision of this Court.

III. Consideration of petitioner's claim that the record supports a finding of error under *Swain v. Alabama*, 380 U.S. 202 (1965) is barred by procedural default, and is without merit.

A. Petitioner did not raise an equal protection argument in state court. He argued for extension of the cross-section requirement under either state or federal constitutional principles, and cited *Swain* only to distinguish its constitutional basis from the one he intended to invoke. The appellate court did not rely on *Swain* as dispositive of the claim, it relied on its own prior decision declining to extend the cross-section requirement. On habeas review, petitioner's claim was of the same character as the one presented in state court, and it was not until after the decision in *Batson v. Kentucky*, 476 U.S. 79 (1986) that he clearly stated an intent to invoke the Equal Protection Clause. Respondents promptly objected on procedural default grounds, and the Court of Appeals held the claim defaulted.

B. The predominant view of *Swain* is that it permits counsel to take the group affiliation of prospective jurors into account when exercising peremptory challenges, if they believe that group affiliation is a trial-related reason for excusal. A fair construction of *Swain* supports this view.

ARGUMENT

I.

APPLICATION OF THE REPRESENTATIVE CROSS-SECTION PRINCIPLE TO THE PETIT JURY SO AS TO RESTRICT THE USE OF PEREMPTORY CHALLENGES IS UNWORKABLE AND UNSOUND.

Three times since *Taylor v. Louisiana*, 419 U.S. 522 (1975) held that the Sixth Amendment right to trial by jury included the right to "selection of a petit jury from a representative cross section of the community", *id.* at 528, this Court has been asked to extend the cross-section requirement so as to impose restrictions on a prosecutor's for-cause or peremptory challenges, and three times it has declined to do so. *Buchanan v. Kentucky*, 107 S.Ct. 2906, 2913 (1987); *Lockhart v. McCree*, 476 U.S. 162, 174 (1986); *Batson v. Kentucky*, 476 U.S. 79, 84, n. 4 (1986). In *McCree*, this Court said:

> . . . we do not believe that the fair cross-section requirement can, or should, be applied as broadly as [the Court of Appeals] attempted to apply it. We have never invoked the fair cross-section principle to invalidate the use of either for-cause or peremptory challenges to prospective jurors, or to require petit juries, as opposed to jury panels or venires, to reflect the composition of the community at large. . . . The limited scope of the fair cross-section requirement is a direct and inevitable consequence of the practical impossibility of providing each criminal defendant with a truly "representative" petit jury, . . . a basic truth that the Court of Appeals itself acknowledged for many years prior to its decision in the instant case. . . . We remain convinced that an extension of the fair cross-section requirement to petit juries would be unworkable and unsound, and we decline McCree's invitation to adopt such an extension.

476 U.S. at 173-174 (citations omitted).

Petitioner offers a disarmingly simple explanation for why such an extension must now be adopted. He says that if it is constitutionally imperative for the pool of eligible jurors to include all distinct and cognizable groups within the community, it can only be because the requirement is intended to have some impact on the composition of the petit jury; and that it follows from this that any practice, at any stage of the selection process, which may reduce the possibility of having the petit jury reflect the demographic makeup of the community bears a burden of justification under the fair cross-section principle.

The argument for extension of the cross-section requirement is, as this Court said in *McCree*, unsound. As discussed in Part I.A, there is a constitutionally significant difference between the process of establishing a jury pool and selecting a venire to provide jurors for all cases, and the process of selecting a petit jury from that venire to try an individual case. The cross-section requirement reflects the belief that no class of citizens may be considered *a priori* unfit for jury service in *any* case solely on the basis of group affiliation, but its theoretical underpinnings do not logically extend to justify restricting a litigant's use of peremptory challenges to select impartial jurors in a *particular* case. Part I.B addresses the point that, while subject to the limited restrictions mandated by the Equal Protection Clause as construed in *Batson*, the peremptory challenge nevertheless continues to play an important role in the ability of both sides to choose fair and impartial jurors, and its salutary effect on the administration of criminal justice would be lost, for both sides, if petitioner's position is adopted.

Furthermore, extension of the cross-section requirement would be, as this Court also said in *McCree*, unworkable. As discussed in Part I.C, the impracticality of applying the cross-section principle at the petit jury stage is demon-

strated by the fact that the standard proposed by petitioner is fundamentally different from the standard proposed by *amicus* The Lawyers' Committee for Civil Rights Under Law (*amicus* The NAACP Legal Defense and Education Fund, Inc., proposes no standard), and both differ significantly from the standards used by the States and the federal circuits which have taken this approach; and by the fact that none of these standards promotes cross-sectional values in a practical and principled way.

A. The Rationale Underlying The Cross-Section Principle Does Not Provide Justification For Restricting The Use Of Peremptory Challenges.

There are four steps involved in the process of selecting a jury to try a case: establishing a pool of persons eligible to serve as jurors in all cases; drawing venires from the pool to obtain the number of prospective jurors needed for all cases pending at a given time; voir dire examination of the venire to determine which jurors should be dismissed from a particular case for cause; and the exercise of peremptory challenges by both parties. In the first two steps, the selection criteria are necessarily general, since the proper function of those stages is only to cull those who are unfit to serve in any case, and those who should be granted an exemption for valid public policy reasons. By contrast, the focus of the third and fourth stages is on the ability of jurors to fairly and impartially serve in an individual case.

Prior to the decision in *Taylor*, a number of this Court's cases acknowledged the importance of broad-based community involvement in the grand and petit jury system, as contributing to its fairness and its appearance of fairness. Selection methods which entirely excluded whole groups from the pool of eligible jurors, or routinely resulted in radical underrepresentation of distinctive groups

on the venires from which jurors were chosen, had been reviewed under the principles of equal protection, *Alexander v. Louisiana*, 405 U.S. 625, 628 (1972); *Carter v. Jury Comm'n*, 396 U.S. 320, 331-332 (1970); *Brown v. Allen*, 344 U.S. 443, 470-471 (1953); *Smith v. Texas*, 311 U.S. 128, 129-130 (1940); *Strauder v. West Virginia*, 100 U.S. 303, 305-306 (1880), due process, *Peters v. Kiff*, 407 U.S. 493, 502 (1972) (plurality opinion); *Fay v. New York*, 332 U.S. 261, 289 (1947), and, in some cases, this Court invoked its supervisory authority over the lower federal courts, *Ballard v. United States*, 329 U.S. 187, 193 (1946); *Thiel v. Southern Pacific Co.*, 328 U.S. 217, 225 (1946); *Glasser v. United States*, 315 U.S. 60, 87 (1942). All of these cases involved selection criteria being applied at the pool or venire stage, and from them emerged the cross-section principle announced in *Taylor*: "that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." 419 U.S. at 528. There is no question that the pool and the venire from which petitioner's jury was selected were drawn in compliance with this command.[1]

Duncan v. Louisiana, 391 U.S. 145 (1968) provided the springboard for the jump made in *Taylor* from what had largely been an equal protection analysis to one grounded in the Sixth Amendment. *Duncan* held that the right to trial by jury was to be applied against the States through the Due Process Clause of the Fourteenth Amendment.

[1] At the time of petitioner's trial, the source list for the pool of eligible jurors was the list of registered voters, *Ill. Rev. Stat.* 1977, ch. 78, §1, and venires were drawn at random from the pool. §8. Qualifications for service were minimal, but there were a number of occupational exemptions. §§2, 4. In 1981, the source list was augmented by adding the list of valid driver's license holders, *Ill. Rev. Stat.* 1981, ch. 78, §§1-1a, and in 1987, automatic exemptions were almost completely eliminated. *Ill. Rev. Stat.* 1986 Supp., ch. 78, §4.

Id. at 149. The explanation in *Duncan* of the function of a jury was relied on in *Taylor* to incorporate the cross-section principle into the jury trial right:

> The purpose of a jury is to guard against the exercise of arbitrary power—to make available the common-sense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional and perhaps overconditioned or biased response of a judge. *Duncan v. Louisiana*, 391 U.S., at 155-156. This prophylactic vehicle is not provided if the jury pool is made up only of special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system. Restricting jury service to only special groups or excluding identifiable segments playing major roles in the community cannot be squared with the constitutional concept of jury trial.

419 U.S. at 530. Still, the holding was limited: the Court emphasized that "we impose no requirement that petit juries actually chosen mirror the community and reflect the various distinctive groups in the population. Defendants are not entitled to a jury of any particular composition, . . . but the jury wheels, pools of names, panels, or venires from which juries are drawn must not systematically exclude distinctive groups in the community and thereby fail to be reasonably representative thereof." *Id.* at 538 (citation omitted). This has been a feature of the cross-section principle since its genesis. While holding that the disqualification of blacks from jury service in all cases violated equal protection, *Strauder*, 100 U.S. at 308, the Court at the same time recognized that there is no constitutional right to the inclusion of blacks on the jury in any individual case, *Virginia v. Rives*, 100 U.S. 313, 320-322

(1880), and it has never retreated from that holding. *Batson*, 476 U.S. at 85, n. 6. Even now, petitioner does not contend that the cross-section principle can be read to require proportional representation, or indeed any representation, of any distinctive group on the petit jury chosen to try a particular case.

The cross-section principle also played a role in the cases dealing with jury size and unanimity. In *Williams v. Florida*, 399 U.S. 78 (1970), the Court held that the tradition of a jury of 12 was based more on historical accident than on any significant quality associated with that number for purposes of the right to a jury trial, and that juries of six did not offend the Sixth Amendment. *Id.* at 100-103. In response to the argument that the reduced size of the jury would result in a corresponding reduction in the opportunity to achieve cross-sectional representation, the Court said:

> . . . while in theory the number of viewpoints represented on a randomly selected jury ought to increase as the size of the jury increases, in practice the difference between the 12-man and the six-man jury in terms of the cross-section of the community represented seems likely to be negligible. Even the 12-man jury cannot insure representation of every distinct voice in the community, particularly given the use of the peremptory challenge. As long as arbitrary exclusions of a particular class from the jury rolls are forbidden, see, *e.g.*, *Carter v. Jury Commission*, 396 U.S. 320, 329-330 (1970), the concern that the cross-section will be significantly diminished if the jury is decreased in size from 12 to six seems an unrealistic one.

Id. at 102. Subsequently, in *Ballew v. Georgia*, 435 U.S. 223 (1978), the Court found that, although the process of constitutional line-drawing in cases regarding jury size is somewhat artificial, *id.* at 231-232, the line had to be

drawn at six; a jury of five was held unconstitutional. Petitioner says the Court reached this result "because [a jury of five] decreases the opportunity for meaningful and appropriate representation of a cross section of the community" (Pet. Br. at 11-12), but that is only partially accurate. This Court actually enumerated five separate concerns which led to its holding, and the concern for cross-sectional representation ranked fourth. *Id.* at 232-239. Other concerns included the negative effect on the dynamics of group deliberation, a greater risk of inaccurate results, and large disparities in the results in close cases. *Id.* A verdict by a non-unanimous six-person jury was held to violate the Sixth Amendment for the same reasons in *Burch v. Louisiana*, 441 U.S. 130, 138 (1979), but in *Apodaca v. Oregon*, 406 U.S. 404 (1972) (plurality opinion), the Court upheld a statute permitting the return of non-unanimous verdicts from 12-person juries, and expressly rejected the contention that it led to nullification of minority viewpoints in violation of the cross-section requirement. *Id.* at 412-414. *See also*, *id.* at 378-380 (Powell, J., concurring in the judgment).[2]

In each of this Court's decisions dealing with the cross-section principle, a systemic aspect of the jury trial, affecting all cases, has been involved. In *Taylor* and the cases that led up to it, it was the way in which jury pools were defined and jury venires drawn, and in *Williams*, *Apodaca*, and *Ballew*, it was the format of the petit jury system. Throughout these decisions, the Court has always been careful to avoid having its opinions construed to im-

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[2] *Apodaca* involved a statute authorizing a verdict by a vote of 10 to two. 406 U.S. at 406. On the same day, the Court upheld a statute permitting a verdict by a vote of nine to three in *Johnson v. Louisiana*, 406 U.S. 356 (1972), but no argument was raised in that case concerning the impact on the cross-section requirement.

pute any extension of the cross-section requirement to the composition of the petit jury actually chosen to try an individual case. *Taylor*, 419 U.S. at 538; *Apodaca*, 406 U.S. at 413; *Fay*, 332 U.S. at 284; *Thiel*, 328 U.S. at 220.[3]

Nevertheless, the California Supreme Court held in *People v. Wheeler*, 22 Cal.3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978), that the cross-section principle is violated by the use of peremptory challenges in an individual case to excuse any members of a cognizable group on the basis of a supposed bias common to members of the group, and although the holding was grounded in the state constitution, the court relied largely on the decisions of this Court discussed above to support the result reached. 538 P.2d at 754-757. Since then, five other states[4] and two federal

[3] In *McCray v. Abrams*, 750 F.2d 1113 (2nd Cir. 1984), *vacated*, 106 S.Ct. 3289 (1986), the court posited that the decisions in the jury size and unanimity cases, and in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), authorized "constitutional scrutiny" of the steps involved in selecting a petit jury from the venire in a specific case. 750 F.2d at 1129. This reading of *Ballew* and *Apodaca* is unwarranted, because neither case involved scrutiny of the composition of a particular petit jury, they involved scrutiny of the structure of the jury system. While *Witherspoon* did involve the composition of the petit jury, it did not rest on the loss of a distinctive community group through the cause excusal of death-scrupled jurors, it rested on the loss of impartiality in a jury so composed. 391 U.S. at 518. No one disputes that the composition of a single jury may be examined to determine whether it is impartial, *see, e.g., Irvin v. Dowd*, 366 U.S. 717 (1961), but the impartiality of the jury in this case is not in question. Moreover, it would be difficult to square the Second Circuit's view of *Witherspoon* with this Court's statement in *McCree* that "[w]e have *never* invoked the fair cross-section principle to invalidate the use of either *for-cause* or peremptory challenges to prospective jurors. . ." 476 U.S. at 173 (emphasis added).

[4] *Fields v. People*, 732 P.2d 1145 (Colo. 1987); *State v. Gilmore*, 103 N.J. 508, 511 A.2d 1150 (1986); *Riley v. State*, 496 A.2d 997 (Del. 1985), *cert. denied*, 106 S.Ct. 3339 (1986); *State v. Neil*, 457 So.2d 481 (Fla. 1984); *Commonwealth v. Soares*, 377 Mass. 481, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979).

circuits[5] have adopted the rationale of *Wheeler*. Many more state courts[6] and federal circuits[7] have rejected this approach.

Petitioner's argument is based on *McCray* and *Booker*, which in turn are based on *Wheeler*. It is that extension of the cross-section requirement to the petit jury follows necessarily from what was said in *Taylor* about the function of the requirement and its relation to the function of the jury. He says that the requirement that jury pools and venires be representative would be pointless if it were not intended to have some impact on the composition of the petit jury, and would be nullified if the peremptory challenge could be used to accomplish in an individual case what would be impermissible at the pool and venire selection stages. (Pet. Br. at 10-11) He also argues that the function of the jury is the interposition of the commonsense judgment of the community between the government and the accused, and that this function could not be performed if any distinctive group could be excluded

[5] *McCray, supra*; *Roman v. Abrams*, 822 F.2d 214 (2nd Cir. 1987); *Booker v. Jabe*, 775 F.2d 762 (6th Cir. 1985), *vacated*, 106 S.Ct. 3289 (1986), *opinion reinstated*, 801 F.2d 871 (6th Cir. 1986), *cert. denied*, 107 S.Ct. 910 (1987).

[6] *See, e.g., Nevius v. State*, 699 P.2d 1053 (Nev. 1985); *State v. Wiley*, 144 Ariz. 525, 698 P.2d 1244 (1985); *State v. Ucero*, 450 A.2d 809 (R.I. 1982); *State v. Sims*, 639 S.W.2d 105 (Mo. App. 1982); *Commonwealth v. Henderson*, 438 A.2d 951 (Pa. 1981); *Blackwell v. State*, 248 Ga. 138, 281 S.E.2d 599 (1981); *Mallot v. State*, 608 P.2d 737 (Ala. 1980); *State v. Grady*, 93 Wis.2d 1, 286 N.W.2d 607 (1979); *State v. Stewart*, 225 Kan. 410, 591 P.2d 166 (1979).

[7] *United States v. Leslie*, 783 F.2d 541 (5th Cir. 1986) (en banc), *vacated*, 107 S.Ct. 708 (1987), *opinion following remand*, 816 F.2d 1006 (5th Cir. 1987); *Willis v. Zant*, 720 F.2d 1212 (11th Cir. 1983), *cert. denied*, 467 U.S. 1256 (1984); *United States v. Childress*, 715 F.2d 1313 (8th Cir. 1983) (en banc), *cert. denied*, 464 U.S. 1063 (1984); *United States v. Whitfield*, 715 F.2d 145 (4th Cir. 1983); *Weathersby v. Morris*, 708 F.2d 1493 (9th Cir. 1983), *cert. denied*, 464 U.S. 1046 (1984).

from the petit jury. (Pet. Br. at 12-13) Finally, he says that the legitimacy of the judicial system suffers in the eyes of the community when the jury that decides a case lacks the appearance of a body representative of the community. (Pet. Br. at 14) The first part of this argument ignores the significant difference between the process of selecting pools or venires and the process of selecting a petit jury, and misinterprets the relevant decisions of this Court. The second and third parts are indistinguishable from the contention that affirmative steps should be taken to have each petit jury actually mirror the diversity of the community.

The equal protection cases which led up to *Taylor* make clear that the exclusion of distinctive groups from eligibility for jury service in any case is discriminatory and pernicious in ways that the use of peremptory challenges in an individual case is not. Disqualifying the members of a group from jury service in all cases acts as "a brand upon them, affixed by the law, an assertion of their inferiority", *Strauder*, 100 U.S. at 308, while the use of peremptory challenges indicates no more than the belief of a litigant in a particular case involving particular issues that the challenged jurors are likely to have a bias with respect to those issues. *A priori* disqualification based on group affiliation also creates the impression that the jury, as an institution, is "the organ of [a] special group or class", *Glasser*, 315 U.S. at 86, while individuals of any group are subject to peremptory challenges in any case. To say that competence for jury service in general "is an individual rather than a group or class matter", *Thiel*, 328 U.S. at 220, is not the same as saying that group identity bears absolutely no relation to the ability of jurors to fairly and impartially decide the issues in a particular case. Furthermore, the contention that if *Taylor* is not extended it will be rendered a nullity, and the jury will

cease to operate as the intended buffer between the government and the accused, is overstated. The requirement that jury pools be representative and venires be selected at random means that the prosecutor cannot know prior to the decision to charge an offense what the composition of the venire will be, and cannot count on having enough peremptory challenges to exclude members of groups deemed partial as well as those individuals with more palpable biases. Thus, the requirement that the pool and venire be cross-sectional discourages "the corrupt or overzealous prosecutor" from bringing "unfounded criminal charges." *Duncan*, 391 U.S. at 156.

Respondents are in complete agreement with petitioner's statement that the "prophylactic purpose [of the jury] is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. . ." (Pet. Br. at 13) However, petitioner makes the leap from this proposition to the following one, in the same sentence: ". . . neither can [the prophylactic purpose] be served if a distinctive group is excluded from the petit jury *by peremptory challenge*." (Pet. Br. at 13) (emphasis added). Nowhere does he explain why the exercise of the peremptory challenge is the operative occurrence which negates the proper functioning of the jury. It is entirely possible that a distinctive group could be excluded from the petit jury because the random draw of a venire produced an aberrant underrepresentation of the group, and because those members who were called were properly excused for cause. Nor does petitioner explain why a multi-racial, multi-ethnic jury of six men and six women from which all Catholics have been peremptorily excused cannot possibly operate as the Sixth Amendment intended it to in a case with no religious overtones at all, while an all-white, all-male, socioeconomically homogenous jury selected without the

use of any peremptory challenges in a case fraught with racial tensions and involving a black female defendant can. The argument that peremptory excusal at the petit jury stage has the same effect on the function of the jury as systematic exclusion from the pool or the venire is an argument that affirmative steps have to be taken to produce cross-sectional juries.

The parallel argument, that peremptory excusal of a group in an individual case results in public perception of unfairness to the same extent as systematic exclusion from the pool or the venire (Pet. Br. at 14), is defective for the same reasons. It is doubtful that public concern would be expressed over the composition of the jury in the first case described above, but not the second. *A priori* exclusion of any distinctive group, such as that involved in *Taylor*, casts a cloud over the entire system, but on a case-by-case basis, perceptions turn not only on who is included on the jury but on who the other participants in the case are. However, the rule of *Batson* protects the integrity of the individual case by prohibiting the use of peremptory challenges to exclude members of a cognizable racial group to which the defendant belongs solely because of the shared characteristic.

The argument that any procedure which may conflict with the opportunity provided by the process of the random draw to achieve cross-sectional representation violates the Sixth Amendment (Pet. Br. at 11-12), is untenable. *Ballew, supra*, is cited in support of this argument, but *Ballew* does not stand for that proposition. *Ballew* teaches that jury size has consequences for the function the jury is intended to perform, and there is a point below which the impairment to that function takes on constitutional significance. "This line-drawing process, 'although essential, cannot be wholly satisfactory, for it requires attaching consequences to events which, when they lie very

near the line, actually differ very little.' " *Burch*, 441 U.S. at 138, quoting *Duncan*, 391 U.S. at 161. Everything said in *Ballew* about the impact of the five-person jury on the opportunity for cross-sectional representation might just as easily apply to a reduction from 12 to six, because it is obvious that a six-person jury presents much less of an opportunity for cross-sectional representation than a jury of 12, but the six-person jury was approved in *Williams*. Also, a non-unanimous 12-person jury may reduce the force of those minority voices which are present on the petit jury, to the detriment of cross-sectional values, but that does not make it unconstitutional. *Apodaca, supra*. Thus, *Williams* and *Apodaca* suggest that cross-sectional values, while important, are not always paramount. It is therefore necessary to examine the importance to the jury system of the peremptory challenge, and the impact petitioner's proposed extension would have on it.

B. Extension Of The Cross-Section Requirement Would Destroy The Value Of The Peremptory Challenge And Seriously Undermine The Ability Of Both Sides To Select A Fair And Impartial Jury.

The discussion which follows proceeds from two assumptions about the cross-section principle: that if it is extended to the petit jury selection stage, the considerations which define what a cognizable group is would be the same as those used when the jury pool or venire is examined; and that it would operate to restrict a defendant's use of peremptory challenges as well as the prosecution's.

The first assumption has not been uniformly accepted by the courts that have endorsed the extension argument. *Taylor* cautions that what groups can be considered cognizable may fluctuate depending on time and place, 419 U.S. at 537, and in *Duren v. Missouri*, 439 U.S. 357

(1979), the Court said that a group is cognizable if its members are sufficiently numerous within the community and distinct from other well-defined groups. *Id.* at 364. These are questions of fact, *Hernandez v. Texas*, 347 U.S. 475, 478 (1954), the resolution of which may require an extensive evidentiary hearing. *See, e.g., Willis v. Zant*, 720 F.2d at 1216-17. However, the courts applying the cross-section requirement at the petit jury selection stage have generally treated cognizability as a question of law, and have arbitrarily limited those groups considered cognizable. *See Fields*, 732 P.2d at 1153-54, n.15, and *Soares*, 387 N.E.2d at 515-516 and n.n. 29, 33 (cognizability defined only by race, gender, religion, and national origin); *Riley*, 496 A.2d at 1012 (limited to race); *McCray*, 750 F.2d at 1131, and *Neil*, 457 So.2d at 487 (race the only defining characteristic discussed, and no subsequent authority dealing with groups other than racial groups.)[8] No valid reason is given for why this should be so.

The second assumption has been accepted by four of the eight jurisdictions that apply the cross-section principle to petit jury selection. *Booker*, 775 F.2d at 772; *Neil*, 457 So.2d at 487; *Soares*, 387 N.E.2d at 517, n.35; *Wheeler*, 583 P.2d at 765, n.29.[9] If such an extension, and the attendant restrictions on the use of peremptory challenges, is necessary to insure a jury which is fair and gives the

[8] It is questionable whether Florida can be characterized as a state applying cross-section principles to petit jury selection. In *Kibler v. State*, 501 So.2d 76 (Fla. App. 1987), it was held that white defendants lack standing to object to the peremptory excusal of blacks, and this makes the Florida rule more closely resemble one based on equal protection rather than Sixth Amendment principles.

[9] In the other jurisdictions, the question of restricting a defendant's challenges was either not discussed (*McCray*; *Riley*), or not resolved (*Fields*, 732 P.2d at 1156, n.19; *Gilmore*, 511 A.2d at 1163, n.6).

appearance of fairness, then the restrictions must apply to all. *Booker*, 775 F.2d at 772. "Society also has a right to a fair trial." *Fay*, 332 U.S. at 288.

As did the State in *Batson*, respondents concede that the Constitution does not guarantee a right to peremptory challenges, and that *Swain v. Alabama*, 380 U.S. 202 (1965) recognized that their use is subject to the strictures of the Equal Protection Clause. However, the argument that restrictions on their use "will eviscerate the fair trial values served by the peremptory challenge", which was rejected in *Batson*, 476 U.S. at 98, carries considerably more force here then it did in the equal protection context. *Batson* carefully limited the opportunity to raise objections to the use of peremptory challenges to those situations in which the excluded group is "a cognizable racial group" of which the defendant is also a member. 476 U.S. at 96. Under a cross-section analysis, there is no requirement that the defendant be a member of the excluded group, nor must the excluded group be "a cognizable racial group." The types of groups that might be considered cognizable for cross-section purposes is potentially limitless, depending only on sufficient numbers and distinctiveness in a given place at a given time, and may include groups defined by age, *see* Annot., 62 ALR 4th 859 (1988), or by economic, social, political, or occupational status, religious affiliation, or geographic location, *see Thiel*, 328 U.S. at 220, as well as groups defined by race, gender, or national origin. *McCree*, 476 U.S. at 175. Thus, extension of the cross-section requirement would limit the peremptory challenge to an infinitely greater degree than does the Equal Protection Clause, and it would limit the defendant as well as the prosecution. Indeed, it would prohibit the use of peremptory challenges by either side for all but frivolous reasons or the most palpable manifestations of individual bias.

The history of the peremptory challenge, and its contribution to the overall fairness of the jury system was recounted at length in *Swain*, 380 U.S. at 212-221, and despite the limited restrictions imposed on its use in *Batson*, this Court continues to recognize that "the peremptory challenge occupies an important position in our trial procedures. . ." 476 U.S. at 98. It allows for the elimination of extremes of partiality at both ends of the spectrum, and insures a jury each of whose members is considered by both parties to be most able to render a fair and just verdict. When group membership correlates with partiality for purposes of the issues involved in a particular case, members of that group will be clustered at one end of the spectrum of partiality and the peremptory challenges used by one side or the other are likely to be directed to some degree at that group. In such a case, rigid adherence to the principle of cross-sectionalism disserves the core guarantee of the Sixth Amendment—an impartial jury—while the peremptory challenge promotes it. Thus, restricting the use of peremptory challenges in the name of cross-sectionalism destroys the value of the challenge and seriously impairs the ability of both sides to select an impartial jury.

C. Extension Of The Cross-Section Requirement Is Unworkable Because No Principled And Practical Standard Has Been Proposed.

In *McCree, supra*, this Court said that "an extension of the fair cross-section requirement to petit juries would be unworkable and unsound. . ." 476 U.S. at 174. Nevertheless, petitioner argues that *Duren, supra*, a case decided seven years before *McCree*, supplies a standard which can be adapted for purposes of applying the cross-section requirement to petit juries. However, the standard proposed by petitioner is inconsistent with the standard proposed by *amicus* The Lawyers' Committee For

Civil Rights Under Law; both are inconsistent with the standard adopted in *Wheeler*; and none of these standards provides a principled and practical approach.

Petitioner proposes that a prima facie violation of the Sixth Amendment can be established by showing that:

> 1) the group alleged to be excluded is a distinctive group in the community;
>
> 2) representation of this group on the petit jury is not fair and reasonable in relation to the number of such persons in the community; and
>
> 3) the underrepresentation is attributable to the prosecutor's use of his peremptory challenges.

(Pet. Br. at 15) This is, almost verbatim, the standard established in *Duren*, the only differences being the substitution of "the petit jury" for "venires from which juries are selected" in the second prong, and "the prosecutor's use of his peremptory challenges" for "systematic exclusion of the group in the jury-selection process" in the third. *See* 439 U.S. at 364.

The failure of this standard to provide a coherent and internally consistent guide for purposes of examining petit jury composition stems from its retention of the proportionality component of the *Duren* standard. At issue in *Duren* was a statute allowing women to opt out of jury service if they did not wish to be called, a practice which resulted in jury venires averaging less than 15% female in the county where Duren was tried, even though women constituted more than 50% of the population of the county. To make out a prima facie case, it was necessary to establish that women were not proportionately represented on venires over a period of time, thus showing systematic exclusion. In other words, the proportionality component of the *Duren* standard is inextricabiy bound up with the need to show that the exclusion was "systematic", *i.e.*,

"inherent in the particular jury-selection process utilized", *id.* at 366, rather than the result of a random draw that produced an aberrant venire in an individual case. Extending the cross-section requirement to the petit jury necessarily entails dropping the requirement that the exclusion be "systematic", but retaining the proportionality element in that context leads to absurd results.

First, it is clear from the standard proposed by petitioner that no objection to the use of peremptory challenges can be raised until the selection of the jury is complete, because it is only then that the second prong of his standard—"representation of [a] group on the petit jury is not fair and reasonable in relation to the number of such persons in the community"—can be evaluated. One cannot know if a group is underrepresented on the petit jury until the composition of the petit jury is known. Second, if the purpose of extending the cross-section requirement is to eliminate the use of any peremptory challenges against members of a cognizable group solely on the basis of group membership rather than on an individualized indication of bias, *see Booker*, 775 F.2d at 771; *McCray*, 750 F.2d at 1131; *Soares*, 387 N.E.2d at 515; *Wheeler*, 583 P.2d at 760-761, then petitioner's standard clearly does not serve that purpose. If the members of a distinctive group make up 20% of the general population of the community, and two members of the group are included on the petit jury, then the group is not underrepresented, and the second prong of the standard cannot be established. Thus, no prima facie violation of the cross-section requirement could be shown, even if the group was overrepresented on the venire and the prosecutor, with ten peremptory challenges, used all of them on other members of the group, freely admitting that group membership was the reason. This suggests one of two things, both of which are fatal to the extension argument. Either some, but not

all, group-based peremptory challenges are permissible, in which case the major premise of the extension argument as set forth in the cases which adopt it is false; or the real aim of petitioner's position is to acquire a right to a petit jury of a particular composition, consisting of a proportionate number of jurors who are members of one or more groups he deems partial to him, which cannot be abridged unless there is a compelling justification. This Court has repeatedly and expressly refused to confer such a right. *Batson*, 476 U.S. at 86, n. 6; *Taylor*, 419 U.S. at 538.

The standard proposed by *amicus* The Lawyers' Committee For Civil Rights Under Law differs from that proposed by petitioner in several significant respects, but is equally ill-suited to serve cross-sectionalism. It calls for comparison of the percentage of group members left on the venire after the prosecutor's peremptory challenges have been exercised with the percentage of the group in the general population, to determine whether there is reasonable proportionality. As with petitioner's focus on proportionality, this suggests that it is permissible, up to a point, to use peremptory challenges for group-based reasons. Moreover, it does not call for examination of the composition of the petit jury at any point, and considerable litigation could take place over a prosecutor's use of peremptory challenges to "exclude" a group which may actually have been substantially overrepresented on the petit jury finally selected in comparison to its numbers in the community. Also, it appears that *amicus* would recognize as "cognizable" only those groups defined by race (Br. for Lawyers' Committee at 12-14), while petitioner's proposed standard contains no such limitation.

The standards proposed by petitioner and *amicus* The Lawyers' Committee not only differ from each other, both differ substantially from the standard adopted in *Wheeler*

and used in the other jurisdictions purportedly applying cross-section principles to the petit jury selection stage. Under *Wheeler*, a prima facie case of a violation of the cross-section requirement has two components, beyond making a record as to the group identity of the venirepersons: a party must show "that the persons excluded are members of a cognizable group within the meaning of the representative cross-section rule"; and "from the circumstances of the case he must show a strong likelihood that such persons are being challenged because of their group association rather than because of any specific bias." 583 P.2d at 764. Although this standard avoids the pitfall of including a proportionality element, it creates other mischief. In *People v. Snow*, 44 Cal.3d 216, 242 Cal. Rptr. 477, 746 P.2d 452 (1987), the defendant, a black man, was tried by a 12-person jury which included two blacks. There is no indication as to how many blacks were on the venire or how large a group they were in the community, but it was shown that the prosecutor used six of the 16 alloted peremptory challenges to excuse blacks. Because the prosecutor had not satisfactorily explained his use of peremptory challenges, the California Supreme Court found that a violation of the cross-section requirement had been shown, and it reversed the conviction. 746 P.2d at 456-458. The court held that the excusal of any members of a cognizable group violates *Wheeler*, whether or not the jury contains other members of that group, and even if the group is represented on the jury in direct proportion to its numbers in the community. 746 P.2d at 457.

As applied in *Snow*, the *Wheeler* standard is indistinguishable from the equal protection analysis employed in *Batson*. This lends support to the observation of Judge Ripple, concurring in the judgment below, that in the time between *Swain* and *Batson* "the sixth amendment analysis was, I respectfully suggest, simply an elliptical way for

the lower courts to avoid the precedential effect of *Swain*." (J.A. at 37)

The problem of formulating a standard for implementing an extension of the cross-section requirement to the petit jury selection stage is that no standard remains true to cross-section principles. The premise that is essential to the courts that have adopted the extension argument is that peremptory challenges may never be used to exclude members of a distinct group based solely on group affiliation. If proportionality is made an element of the standard, then the premise is proven false because the standard does nothing to remedy even blatantly group-based challenges once minimum proportional representation is achieved. However, if proportionality is irrelevant, then a remedy exists for a single group-based challenge, even if the jury finally chosen is a perfect mirror of the community, and the remedy is reversal of the conviction in the name of cross-sectionalism. Thus, extension of the cross-section requirement to the petit jury is theoretically unsound and practically unworkable, and the judgment of the Court of Appeals should be affirmed.

II.

FOR PURPOSES OF THE RETROACTIVITY DOCTRINE, THE DATE OF THE ANNOUNCEMENT OF A NEW RULE OF CONSTITUTIONAL LAW IS THE ONLY APPROPRIATE WATERSHED, AND THE RULE OF *BATSON v. KENTUCKY* SHOULD NOT BE APPLIED RETROACTIVELY TO CASES IN WHICH THE CONVICTION BECAME FINAL PRIOR TO THE DATE OF THE DECISION.

In its relatively brief history, the retroactivity doctrine has been a subject of considerable debate among the members of this Court, and it has recently undergone considerable change. However, at least since *Linkletter v. Walker*, 381 U.S. 618 (1965), two aspects of this doctrine

have remained constant, and have never been questioned. The first is that when giving retroactive effect to a new rule of constitutional law, the date of the announcement of the rule is the watershed event, and not some event occurring prior to the rendition of judgment. The second is that what Justice Harlan called the Blackstonian theory—"that the law should be taken to have always been what it is said to mean at a later time", *Mackey v. United States*, 401 U.S. 667, 677 (1971) (Harlan, J., dissenting)—is not viable. It is these principles which petitioner calls into question in this case.

A. The Denial Of Certiorari In *McCray v. New York* Neither Foreshadowed The Decision In *Batson v. Kentucky* Nor Destroyed The Precedential Effect Of *Swain v. Alabama*.

This Court denied certiorari in *McCray v. New York*, 461 U.S. 961 (1983) on May 31, 1983, four months before petitioner's conviction became final upon the completion of direct review. McCray sought relief on grounds that the prosecutor in his case used peremptory challenges to exclude all blacks and Hispanics from the jury, alleging violations of equal protection and the Sixth Amendment. *See McCray v. New York*, 51 U.S.L.W. 3740 (U.S. April 12, 1983) (No. 82-1381). Justice Stevens, joined by Justices Blackmun and Powell, filed an opinion respecting the denial of certiorari, noting the importance of the issues raised, but expressing a preference "to allow the States to serve as laboratories in which the issue receives further study before it is addressed by this Court." 471 U.S. at 963. Justice Marshall, joined by Justice Brennan, dissented from the denial of certiorari.

Three years later, this Court decided *Batson v. Kentucky*, 476 U.S. 79 (1986), and it subsequently held that the rule of *Batson* was to be given retroactive effect to all cases pending on direct review "when *Batson* was decided", *Griffith v. Kentucky*, 107 S.Ct. 708, 710 (1987), but not

to "convictions that became final before our decision [in *Batson*] was announced." *Allen v. Hardy*, 106 S.Ct. 2878, 2880 (1986) (per curiam). Petitioner's conviction became final before the decision in *Batson* was announced, but he says that retroactive application in accord with *Griffith* should be extended to cases like his, pending on direct review when certiorari was denied in *McCray*. He argues that the observations of three Justices regarding the importance of the issues presented by McCray's petition, coupled with the dissenting opinions of two Justices, indicated that a majority of this Court was interested in reexamining *Swain v. Alabama*, 380 U.S. 202 (1965), and that this had the effect of destroying the precedential force of *Swain*. (Pet. Br. at 23-26)

The contention that *Swain* was made a dead letter by the opinions accompanying the denial of certiorari in *McCray* is wrong for several reasons. The opinion of Justice Stevens notes that two state courts had scrutinized the use of peremptory challenges in individual cases by relying on Sixth Amendment principles, 461 U.S. at 962, n.*, and encourages "the various *States*", *id.* at 963 (emphasis added), to serve as laboratories. This suggests an interest not in reexamining the equal protection holding of *Swain*, but in the analysis of Sixth Amendment principles developed after *Swain*. Because of its reference to "the various States", the opinion does not imply that the lower federal courts should be free to reinterpret the Equal Protection Clause.

Similarly, the dissent in *McCray* focuses on Sixth Amendment principles, and although critical of *Swain*, does not perforce advocate overturning it. The dissent takes the view that the developments in Sixth Amendment jurisprudence after *Swain* provide a different constitutional basis for reaching a different result. 461 U.S. at 965-970. Moreover, all of the state courts that departed from *Swain*

did so on the basis of jury trial provisions in their state constitutions, and they referred to state equal protection guarantees only to define cognizable groups. Even the two federal circuits that accepted the invitation to serve as laboratories reaffirmed the continued vitality of *Swain* as the prevailing equal protection doctrine. *Booker v. Jabe*, 775 F.2d 762, 767 (6th Cir. 1985), *vacated*, 106 S.Ct. 3289, *opinion reinstated* 801 F.2d 871 (6th Cir. 1986), *cert. denied*, 107 S.Ct. 910 (1987); *McCray v. Abrams*, 750 F.2d 1113, 1123-24 (2nd Cir. 1984), *vacated*, 106 S.Ct. 3289 (1986). Petitioner says that after the denial of certiorari in *McCray*, no lawyer worthy of the name could rely with confidence on the continued vitality of *Swain*. (Pet. Br. at 25) In fact, between *McCray* and *Batson*, not even the courts that were most critical of *Swain* believed that it was not the dominant equal protection precedent.

The question of retroactivity arises only when a decision represents a significant departure from prior precedent. *Batson* was "an explicit and substantial break with prior precedent", *Allen*, 106 S.Ct. at 2880, overruling the key portion of *Swain*. To accept the proposition that such a momentous event as this Court overruling one of its prior decisions was so clearly foretold in the nonbinding opinions expressed on the denial of certiorari three years earlier is to make a greater precedent of *McCray* than *Batson*. For purposes of the retroactivity doctrine, the announcement of a new rule of constitutional law by this Court must always be considered the main event.

Petitioner also makes a separate argument that retroactive application of *Batson* to cases in which the conviction became final prior to the decision, but after the denial certiorari in *McCray*, is not inconsistent with *Allen*. (Pet. Br. at 26-29) *Griffith* and *Allen* divide the cases into two categories for purposes of *Batson* retroactivity: cases in which the conviction became final either before or after

the decision. Petitioner appears to be saying that a third category should be created, consisting of cases in which the conviction became final in the time between *McCray* and *Batson*, and that, without disturbing either *Griffith* or *Allen*, retroactivity for this third category may be separately considered. He then invokes the three-part *Linkletter* analysis. This argument is confusing, because it suggests that while *McCray* did not destroy the precedential effect of *Swain*, thereby making the proposed third category entitled to the benefit of *Batson* through *Griffith*, *McCray* should still be given some significance for retroactivity purposes. Petitioner does not say why. Moreover, *Allen* applied the *Linkletter* test and found that, for cases in which the conviction became final prior to *Batson*, retroactive application was unwarranted. Petitioner presents no reason why the *Linkletter* analysis should yield a different result depending on how long before *Batson* the conviction became final.

B. Retroactive Application Of *Batson* To Cases In Which The Conviction Became Final Prior To The Decision Is Unwarranted, Regardless Of Whether The Harlan Approach Or The Three-Part *Linkletter* Test Is Applied.

In his now famous dissents in *Mackey v. United States*, 401 U.S. 667 (1971) and *Desist v. United States*, 394 U.S. 244 (1969), Justice Harlan was critical of the approach to the question of retroactivity taken by the Court in *Linkletter*, and further developed in *Stovall v. Denno*, 388 U.S. 293 (1967). Under *Linkletter* and *Stovall*, the question of whether a new rule of constitutional law was to be given retroactive effect was answered on a case-by-case basis, by looking to the purpose of the new rule, the extent of reliance on the old standard, and the impact retroactive application would have on the administration of justice. *Stovall*, 388 U.S. at 297. In Justice Harlan's view, this led to *ad hoc* and inconsistent decisions, and deviated from

the correct model of judicial review. He advocated a dichotomy between direct and collateral review, whereby a new rule of law announced on direct review would apply to all similarly situated cases, but, with two narrow exceptions, would not apply to cases on collateral review at the time of the decision. Application of the new rule to cases where the conviction had previously become final was unjustifiable, according to Justice Harlan, because the proper function of collateral review was limited to testing the validity of the judgment under the standards prevailing at the time of the conviction, and because the interests of finality and comity weighed against expanding the role of habeas corpus. *Mackey*, 401 U.S. at 681-693 (Harlan, J., dissenting): *Desist*, 394 U.S. at 260-269 (Harlan, J., dissenting).

The first part of Justice Harlan's analysis, requiring new rules to be applied to all non-final cases, gained acceptance gradually. It was applied only to Fourth Amendment cases in *United States v. Johnson*, 457 U.S. 537 (1982), then to Fifth Amendment cases in *Shea v. Louisiana*, 450 U.S. 51 (1985), and finally to all cases in *Griffith*. The Court has yet to state whether it will adopt the second part of the Harlan approach, *see Yates v. Aiken*, 108 S.Ct. 534, 537 (1988), and there remains much resistance to it. *See Griffith*, 107 S.Ct. at 717-719 (White, J., dissenting); *Shea*, 470 U.S. at 61-67 (White, J., dissenting); *Johnson*, 457 U.S. at 564-568 (White, J., dissenting).

Citing the dissenting opinions in *Shea* and *Johnson*, petitioner argues that there should be no distinction for retroactivity purposes between direct and collateral review, and that all new constitutional rules should always be fully retroactive. (Pet. Br. at 30-32) The dissents in *Shea* and *Johnson*, and in *Griffith*, do not support that view. They advocate adherence to the *Stovall* test, and as this Court held in *Allen*, *Batson* is not retroactive under the *Stovall*

test to cases like petitioner's where the conviction became final prior to the decision. Not since before *Linkletter* has the view now propounded by petitioner been a part of the retroactivity debate.

One of the exceptions to the rule of non-retroactivity for cases on collateral review discussed by Justice Harlan concerned the establishment of procedures that must be said to be " 'implicit in the concept of ordered liberty.' " *Mackey*, 401 U.S. at 693 (Harlan, J., dissenting), quoting *Palko v. Connecticut*, 302 U.S. 319, 325 (1937). In their brief (at 16-18), *amicus* The Lawyers' Committee For Civil Rights Under Law invokes this exception, arguing that racial discrimination is inimical to democratic principles, and particularly so when it occurs within the judicial system.

It is clear from the context that the phrase quoted in Justice Harlan's opinion was used in *Palko* to describe those portions of the Bill of Rights which should be incorporated through the Fourteenth Amendment to apply against the States. *See* U.S. at 323-325. It is equally clear that when Justice Harlan invoked that phrase, he did not intend for it to mean precisely the same thing it meant to Justice Cardozo when he wrote it. Otherwise, Justice Harlan's view would have been that all new rules established on Fourth, Fifth, or Sixth Amendment grounds would be fully retroactive, and that is not the case. Justice Harlan cited *Gideon v. Wainwright*, 372 U.S. 335 (1963) as an example of a new rule that would fit within this exception. *Gideon* held that the States were bound to observe the Sixth Amendment's guarantee of counsel for the accused, because it is essential to the fairness of the trial and the ability of the accused to have his side of the case heard. *Id.* at 343-345. If the rule of *Batson* was essential to the fairness of a jury trial, such that without it the defendant's opportunity to present his case would

be meaningless, then it would have been retroactive under *Stovall*, because it would have been essential to the accuracy of the fact-finding process. However, this Court said in *Allen* that while *Batson* may serve to enhance accuracy, the rule it establishes is not one that " 'goes to the heart of the truthfinding function.' " *Allen*, 106 S.Ct. at 2880, quoting *Solem v. Stumes*, 465 U.S. 638, 645 (1984).

Whether analyzed under the *Stovall* test or under the views on retroactivity articulated by Justice Harlan, retroactive application of *Batson* to review of convictions, like petitioner's, that became final before the decision is not warranted. The judgment of the Court of Appeals should therefore be affirmed.

III.

PROCEDURAL DEFAULT BARS CONSIDERATION OF PETITIONER'S THIRD ARGUMENT; AND, IN AN INDIVIDUAL CASE, THE PEREMPTORY EXCUSAL OF JURORS WHO ARE MEMBERS OF A COGNIZABLE RACIAL GROUP TO WHICH THE DEFENDANT ALSO BELONGS, IN THE BELIEF THAT SUCH JURORS WILL BE SYMPATHETIC TO THE DEFENDANT BECAUSE OF THE SHARED GROUP CHARACTERISTIC, DOES NOT VIOLATE THE EQUAL PROTECTION CLAUSE AS CONSTRUED IN *SWAIN v. ALABAMA*.

In his third argument, petitioner contends that a violation of the Equal Protection Clause as construed in *Swain v. Alabama*, 380 U.S. 202 (1965) may be established in an individual case if the prosecutor volunteers explanations for his exercise of peremptory challenges, and the explanations are proven to be a pretext. Consideration of this claim is barred by procedural default, because petitioner did not raise it in the Illinois Appellate Court, and that court expressed no view on this interpretation of *Swain*.

Moreover, on the merits, petitioner's argument is based on a misinterpretation of *Swain*. Petitioner fails to distinguish between the situation where the prosecutor states that his excusal of jurors belonging to a cognizable racial group is based on his belief that such persons are ununqualified to serve as jurors in any case, and the situation where the reason is that such persons are likely to be partial to the defendant in a particular case because the defendant is also a member of the group. In the first situation, the evidentiary burden imposed in *Swain* is satisfied by the prosecutor's admission, but *Swain* does not prohibit the use of peremptory challenges based on group affiliation if the prosecutor believes group affiliation is related to the outcome of the trial.

A. The Argument That The Equal Protection Clause As Construed In *Swain* Can Be Violated By The Use Of Peremptory Challenges In An Individual Case Was Not Raised In Or Decided By The Illinois Appellate Court.

The failure to raise a claim on direct appeal constitutes a procedural default which bars habeas corpus review to the same extent as the failure to object at trial. *Murray v. Carrier*, 106 S.Ct. 2639, 2648 (1986). When his case was before the Illinois Appellate Court, petitioner argued that the manner in which the prosecutor exercised peremptory challenges deprived him of a fair trial and an impartial jury under the Sixth and Fourteenth Amendments, and under the Illinois Constitution, and that the court should adopt the rationale of *Commonwealth v. Soares*, 377 Mass. 461, 387 N.E.2d 499, *cert. denied*, 444 U.S. 881 (1979) and *People v. Wheeler*, 22 Cal.3d 258, 148 Cal. Rptr. 890, 583 P.2d 748 (1978) and apply cross-section principles. His only reference to *Swain* was to distinguish its analytical framework from the one he intended to invoke. (Appellant's Br. at 73-83; Appellant's reply Br. at 7) No effort was made to persuade the court to read *Swain* in a certain way,

and to find an impermissible use of peremptory challenges under the equal protection analysis of *Swain*. In its ruling, the court reviewed the facts, *People v. Teague*, 108 Ill. App. 3d 891, 439 N.E.2d 1066, 1069-70 (1st Dist. 1982), *cert. denied*, 464 U.S. 867 (1983), discussed the cross-section cases on which petitioner relied, 439 N.E.2d at 1070, and declined to follow that approach. 439 N.E.2d at 1070-71. Accordingly, the Court of Appeals found that any argument based on *Swain* had been procedurally defaulted. (J.A. 17, n.6)

Petitioner admits that his present argument was not presented to the state appellate court, but he says that the court resolved the issue as though he had raised it. (Pet. Br. at 39) The applicability of *Swain* when the prosecutor volunteers an explanation for his challenges is an issue that has split the circuits. *Compare Weathersby v. Morris*, 708 F.2d 1493, 1496 (9th Cir. 1983), *cert. denied*, 464 U.S. 1046 (1984) (applying *Swain*) with *United States v. Newman*, 549 F.2d 240, 249 (2nd Cir. 1977) (holding *Swain* inapplicable). It is extravagent to assert that the appellate court's mere citation of *Swain*, followed by a statement of what is usually understood to be its holding, *see* 439 N.E.2d at 1070, constitutes a resolution of a question concerning the proper interpretation of *Swain* that was not even posed. Petitioner says that the appellate court rejected his claim because it found *Swain* dispositive. (Pet. Br. at 39) In fact, it did not. It found dispositive of the issue presented its own decision in an earlier case, and the decisions of the other jurisdictions, rejecting the application of cross-section principles to petit jury selection procedures. Petitioner's third argument is therefore barred by procedural default.

Petitioner also argues that, although he did not raise his claim concerning the proper construction of *Swain* in state court, respondents may not rely on procedural de-

fault as a defense to that claim because they did not urge it below. (Pet. Br. at 38) The habeas corpus petition filed in the district court alleged that the circumstances of the case gave rise to a violation of petitioner's Sixth and Fourteenth Amendment rights (R. 1, pp. 4-5), and the accompanying brief presented only one argument, seeking adoption of the cross-section analysis. Respondents' memorandum in support of their motion for summary judgment addressed the impropriety of adopting petitioner's cross-section argument, and further asserted that no equal protection violation could be shown under *Swain* because the record contained no evidence outside the facts of petitioner's case. (R. 14) In his cross-motion, petitioner responded to the arguments against adopting a cross-section analysis, and in one paragraph, cited *Weathersby* as demonstrating "[a]nother method by which this Court can find that petitioner has demonstrated that his constitutional rights have been violated. . ." (R. 20, p. 5) The Equal Protection Clause was not mentioned. Respondents, in reply, distinguished *Weathersby* on its facts. (R. 22, p. 4) On appeal, petitioner continued to rely on a cross-section analysis. The question of whether an equal protection claim had been procedurally defaulted was addressed in supplemental memoranda filed by the parties, after *Batson v. Kentucky*, 476 U.S. 79 (1986) was decided.

Petitioner cites *Granberry v. Greer*, 107 S.Ct. 1671 (1987), which holds that the failure to raise the defense of exhaustion in a timely fashion may or may not preclude reliance on it at a later stage of the proceedings, depending on how the interests of comity and federalism would be best served. Respondents did not fail to raise procedural default in a timely fashion. Petitioner expressly disavowed reliance on equal protection in state court, did not raise it in his petition or his opening brief, and referred to it only obliquely in his cross-motion. The only

point during the habeas proceedings at which petitioner clearly declared his intent to rely on equal protection as a basis for relief independent of his cross-section argument was after the decision in *Batson*. Respondents then promptly answered that procedural default barred the claim, and the Court of Appeals agreed. Thus, respondents' present procedural default argument has been properly preserved. *Cf.*, *Engle v. Isaac*, 456 U.S. 107, 124, n. 26 (1982).

B. The Peremptory Excusal Of Jurors Who Are Members Of A Cognizable Racial Group To Which The Defendant Also Belongs, In The Belief That They Will Be Partial To The Defendant, Is Permitted By *Swain*.

The predominant view of *Swain* is that it permits the prosecutor to take the race of prospective jurors into account when exercising peremptory challenges, and to excuse those who are the same race as the defendant in the belief that they are likely to be partial to him. *United States v. Clark*, 737 F.2d 679, 682 (7th Cir. 1984); *United States v. Thompson*, 730 F.2d 82, 85 (8th Cir.), *cert. denied*, 469 U.S. 1024 (1984); *United States v. Newman*, 549 F.2d 240, 249 (2nd Cir. 1977); *Cunningham v. Estelle*, 536 F.2d 82, 84 (5th Cir. 1976); *United States v. Carter*, 528 F.2d 844, 850 (8th Cir. 1975), *cert. denied*, 425 U.S. 961 (1976). Two courts have taken a contrary view, stating that such use of peremptory challenges is improper even under *Swain*, and that constitutional error may be shown on the record of an individual case if the prosecutor volunteers an explanation which is determined to be pretextual. *Garrett v. Morris*, 815 F.2d 509, 511 (8th Cir.), *cert. denied*, 108 S.Ct. 233 (1987); *Weathersby v. Morris*, 708 F.2d 1493, 1496 (9th Cir. 1983), *cert. denied*, 464 U.S. 1046 (1984).

In part II of its opinion in *Swain*, this Court expressly recognized that peremptory challenges are

> . . . frequently exercised on grounds normally thought irrelevant to judicial proceedings or official action, namely, the race, religion, nationality, occupation or affiliations of people summoned for jury duty. For the question a prosecutor or defense counsel must decide is not whether a juror of a particular race or nationality is in fact partial, but whether one from a different group is less likely to be. . . . Hence veniremen are not always judged as individuals for the purpose of exercising peremptory challenges. Rather they are challenged in light of the limited knowledge counsel has of them, *which may include their group affiliations*, in the context of the case to be tried.

380 U.S. at 220-221 (footnotes omitted) (emphasis added). Knowing that this was the practice, the Court did not disapprove of it. It stated that "[w]ith these considerations in mind, we cannot hold that the striking of Negroes in a particular case is a denial of equal protection of the laws." *Id.* at 221.

In part III of its opinion, the Court distinguished the approved practice from a situation that might give rise to an equal protection violation

> We have decided that it is permissible to insulate from inquiry the removal of Negroes from a particular jury on the assumption that the prosecutor is acting on acceptable considerations related to the case he is trying, the particular defendant involved and the particular crime charged. But when the prosecutor in a county, *in case after case*, whatever the circumstances, whatever the crime *and whoever the defendant or the victim may be*, is responsible for the removal of Negroes who have been selected as qualified jurors by the jury commissioners and who have survived challenges for cause, with the result that no Negroes ever serve on petit juries, the Fourteenth Amendment claim takes on added significance. . . . In these circumstances, *giving even the widest leeway to the operation of irrational but trial-related*

> *suspicions and antagonisms*, it would appear that the purposes of the peremptory challenge are being perverted. If the State has not seen fit to leave a single Negro on any jury in a criminal case, the presumption protecting the prosecutor may well be overcome. Such proof might support a reasonable inference that Negroes are excluded from juries *for reasons wholly unrelated to the outcome of the particular case on trial* and that the peremptory system is being used to deny the Negro the same right and opportunity to participate in the administration of justice enjoyed by the white population. These ends the peremptory challenge is not designed to faciliate or justify.

Id. at 223-224 (citation omitted) (emphasis added). What the Court disapproved of in part III of the opinion was the peremptory excusal of blacks in all cases in the belief that blacks are unqualified to serve in all cases, and it distinguished this from the practice it sanctioned, namely, the peremptory excusal of blacks in cases where, because of who the defendant or the victim was, the presence of blacks on the jury was believed to bear a relation to the outcome, even if a court might consider the belief irrational. Even the dissent did not question the analysis in part II of the majority opinion. The position of the dissent was that the petitioner had satisfied the burden discussed in part III:

> The holding called for by this case, is that where as here, a Negro defendant proves that Negroes constitute a substantial segment of the population, that Negroes are qualified to serve as jurors, and that none or only a token number has served on juries *over an extended period of time*, a prima facie case of the exclusion of Negroes from juries is then made out. . .

Id. at 244-245 (Goldberg, J., dissenting).

Nothing said in *Batson* puts a different gloss on *Swain*. The majority opinion notes that the lower courts, "following the teaching of *Swain*", 476 U.S. at 92, have read it to require proof of repeated peremptory excusal of members of a group in case after case over a period of time, but the Court did not say that this was an incorrect view of the holding in *Swain*. It said "we reject this evidentiary formulation as inconsistent with standards *that have been developed since Swain* for assessing a prima facie case under the Equal Protection Clause." *Id.* at 93. Similarly, the footnote in Justice White's concurring opinion, *see* 476 U.S. at 101, n.* (*White*, J., concurring), indicates only that a prosecutor's statement that he believed blacks to be unqualified to serve as jurors in any case would be enough to satisfy the evidentiary burden outlined in part III of the *Swain* opinion. Nothing in this observation detracts from the statement in part II of the *Swain* opinion that it is permissible to take race or other group affiliation of prospective jurors into account when exercising peremptory challenges if group affiliation is believed to bear a relationship to the jurors' perception of the case on trial.

The prosecutor in this case did not say that he was peremptorily excusing blacks because he believed them to be unqualified as jurors in any case. The stated reasons were that some jurors "were of very young years" and that "a balance of an equal number of men and women" was desired. (J.A. 3) Petitioner presents an elaborate argument in an effort to show that the stated reasons were not the real reasons (Pet. Br. at 18-21), and he infers from this that the real reason was that the challenged jurors, like him, were black. Even assuming this to be the case, *Swain* permitted peremptory challenges to be exercised for such reasons, and that is the crucial difference between *Swain* and *Batson*. *Batson* did not merely alter the evidentiary burden outlined in part III of the *Swain* opinion, it overruled the premise which was the foundation

of part II of the opinion, *i.e.*, that it is permissible to presume that black jurors will be sympathetic to black defendants and to exercise peremptory challenges on that basis. *Swain* therefore provides no basis for finding a violation of equal protection on the record in this case, and the judgment of the Court of Appeals should be affirmed.

CONCLUSION

For all the foregoing reasons, respondents respectfully request that the judgment of the United States Court of Appeals be affirmed.

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Dated: July 1, 1988

REPLY

BRIEF

No. 87-5259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1988

FRANK DEAN TEAGUE,

Petitioner,

v.

MICHAEL LANE, Director, Department of Corrections, and MICHAEL O'LEARY, Warden, Stateville Correctional Center,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

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ARGUMENT

I. THE PROSECUTION'S USE OF THE PEREMPTORY CHALLENGE TO DEFEAT THE POSSIBILITY THAT THE PETIT JURY WILL REPRESENT A FAIR CROSS SECTION OF THE COMMUNITY VIOLATES THE DEFENDANT'S SIXTH AMENDMENT RIGHT TO A FAIR AND IMPARTIAL JURY.

A. No Constitutionally Significant Difference Exists Between Selection Of Jurors For Jury Pools And Venires And Selection Of Jurors For The Petit Jury.

Respondents contend a constitutionally significant difference exists between the process of establishing a jury pool and selecting a venire to provide jurors for all cases, and the process of selecting a petit jury from the venire to try an individual case, such that *a priori* disqualification of jurors based on group affiliation is intolerable in the former instances but acceptable in the latter. The focus at the pool and venire stages being on the fitness of jurors to serve in any case, whereas the focus at the petit jury stage being on the ability of the jurors to be fair in the individual case, the peremptory challenge of jurors based on their membership in a cognizable group is permissible in Respondents' view whenever group membership correlates with partiality for purposes of the issues involved in an individual case. From their perspective, the *a priori* exclusion of black citizens from the jury pool or venire would violate the Sixth Amendment fair cross-section requirement, but challenge of black citizens peremptorily based on their race would not, because the peremptory challenge evidences the prosecutor's judgment that the excluded black jurors are unable to fairly and impartially decide the issues in a particular case.

There is no distinction of substance between an *a priori* disqualification of jurors based on their race for purposes of selection of the jury pool or venire, which Respondents

agree is to be condemned, and the peremptory challenge of jurors from a petit jury based on their race. Both exclusions are equally reprehensible because in each instance an *a priori* judgment is being made as to the worthiness of the jurors as a class, separate and apart from their individual ability and fitness to serve. *Thiel* v. *Southern Pacific Co.*, 328 U.S. 217, 220 (1946).

The stated legal underpinnning for Respondents' argument is the "equal protection cases which led up to *Taylor* [which] make clear that the exclusion of distinctive groups from eligibility for jury service in any case is discriminatory and pernicious in ways that the use of peremptory challenges in an individual case is not." (Resp. Br. 20) Even were this interpretation of the Equal Protection Clause correct,[1] Respondents' argument is misfocused. The claim at issue is founded in the Sixth Amendment, not the Fourteenth.

An equal protection challenge is concerned with discriminatory purpose, whereas a fair cross-section challenge is concerned with the disproportionate exclusion of a distinctive group. *Duren* v. *Missouri*, 439 U.S. 357, 368 n. 26 (1979). Whether a brand of inferiority has been affixed on jurors who are peremptorily challenged due to their race is a separate question from whether a defendant has been denied his right to a fair possibility of a cross-sectional jury. If it is determined that a cognizable group

[1] Respondents do not identify their source for this distinction but their assumption that the Equal Protection Clause would not be offended by the peremptory challenge of black jurors based on the judgment their race renders them unable to be fair in an individual case is contrary to *Batson* v. *Kentucky*, 476 U.S. 79, 97 (1986), which interprets the clause to forbid challenge of "black veniremen on the assumption that they will be biased in a particular case simply because the defendant is black."

has been disproportionately excluded from a jury, the State can justify this infringement of the Sixth Amendment by showing attainment of a fair cross section to be incompatible with a significant state interest. *Taylor* v. *Louisiana*, 419 U.S. 522, 533-535 (1975). Proof of a fair cross-section violation requires no demonstration of discriminatory intent and the State's explanation for its exclusion of a cognizable group does not defeat the demonstration of a prima facie fair cross-section violation, but merely justifies the failure to achieve a fair community cross section if it qualifies as a significant state interest.[2]

No inconsistency exists between exclusion of jurors on the basis of race by peremptory challenge and the constitutional concept of a jury trial, according to Respondents. A jury from which the prosecutor has removed all black jurors by peremptory challenge will serve its prophylactic purpose because in making his charging decision a prosecutor will not know that he will in fact try his case before an all-white jury. (Resp. Br. 21) The threat of a fair and impartial jury will not deter a prosecutor in the many instances where he can be reasonably assured in advance that his peremptory challenges are sufficient in number to bar a minority from the jury.

The theoretical right to trial by jury from which a cognizable group has not been affirmatively excluded would not afford the accused the full protection intended

[2] Respondents overstate the weight of authority supporting their arguments. (Resp. Br. 19 n.6 and 7) The cases they cite decline to find use of the peremptory challenge to exclude a minority violated the Sixth Amendment or their state constitutions because of a belief that *Swain* v. *Alabama*, 380 U.S. 202 (1965) presented a fundamental obstacle to any successful attack on the peremptory challenge in a single case.

by the Sixth Amendment guarantee. The right to trial by jury is intended to be a safeguard against the compliant, biased or eccentric judge, as well as against the corrupt or overzealous prosecutor. *Duncan* v. *Louisiana*, 391 U.S. 145, 156 (1968). The removal of a distinctive group by peremptory challenge dilutes the quality of community judgment on the jury, interfering with the ability of the jury to perform this function, *Taylor*, 419 U.S. at 535, as well as converting the jury into an organ of a special group or class. *Glasser* v. *United States*, 315 U.S. 60 (1941).

Respondents believe that public concern for the integrity of the criminal justice system is no greater where the prosecution exercises its challenges so as to exclude black jurors from an individual jury, than where an all-white jury is selected as a result of random draw. Surely, there is a difference in the public's perception between an all-white jury selected purely by chance and against the prevailing odds and an all-white jury achieved because a governmental official in a very public forum has eliminated prospective jurors because of the color of their skin. In the former instance, a neutral formula has been employed to achieve that unexpected result; in the latter, a race-conscious formula is used to achieve a deliberate perversion.[3]

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[3] It is not sufficient that the rule of *Batson* prevents exclusion of jurors based on race where the defendant is himself a member of the excluded group (Resp. Br. 22), because there are instances where the prosecutor may seek exclusion of a group from a jury due to his perception that that group will disfavor his case although defendant is not himself a member of the excluded group. (Pet. Br. 9) Respondents also incorrectly assume that the exclusion of black jurors has relevance only for issues involving race, an assumption rejected in *Peters* v. *Kiff*, 407 U.S. 493, 503 (1972).

Respondents fail to recognize that acceptance of these same arguments would result in rejection of the principle that exclusion of a cognizable group from the jury pool or venire violates the Sixth Amendment. The process of random draw and selection may result in an all-white venire from which a petit jury is selected. However, it is only where this discrepancy occurs consistently, rather than occasionally, that a fair cross-section violation is demonstrated because only then is it apparent the cause of the underrepresentation is inherent in the particular jury selection process utilized. *Duren*, 439 U.S. at 366. The Sixth Amendment countenances that an unrepresentative jury may result from the process of random selection but does not tolerate unrepresentativeness caused by a perversion of that process. Where perversion occurs, whether by operation of a statutory exemption from the jury pool or the exercise of the peremptory challenge, the jury is not the embodiment of the democratic ideal and the Sixth Amendment is violated. The impossibility of the achievement of a truly representative jury in every instance does not excuse the systematic and intentional exclusion of a cognizable group from a jury. *Thiel*, 328 U.S. at 220.

In neither the petit jury nor the venire context does the Sixth Amendment require that any affirmative step be taken to ensure that the petit jury or the venire in each instance mirrors the community. Petitioner contends only that it bars any affirmative action which interferes with the representative character of the jury resulting from the process of random selection.

B. Inconsistency Exists Between The Goal Of Selection Of Fair And Impartial Jurors And The Restriction Of Use Of The Peremptory Challenge To Exclude A Cognizable Group.

Respondents concede that the peremptory challenge is not constitutionally guaranteed but contend that recogni-

tion that the fair cross-section requirement limits the use of the peremptory challenge would, even more than the rule of *Batson*, disserve the core guarantee of the Sixth Amendment—an impartial jury—that unfettered use of the peremptory challenge would promote, because the Sixth Amendment would limit both defense as well as prosecution challenges[4] and potentially apply to a "limitless" number of cognizable groups. (Resp. Br. 23-26).

The fundamental defect in Respondents' argument is their failure to recognize that if it were established in a particular case that members of a cognizable group were actually partial and could not be fair, or that a reasonable basis existed to fear their partiality, a significant state interest would exist which would justify elimination of the group from the jury. The Sixth Amendment would not interfere with "elimination of extremes of partiality at both ends of the spectrum," (Resp. Br. 26) but would prevent removal of members of a distinctive group on the basis of *a priori*, irrational group-based judgments about their partiality. The fair cross-section requirement guarantees, rather than interferes with, achievement of an impartial jury. Respondents do not claim that the basis for the exclusion of the black jurors in this case was other than their common racial identity or that denial of their right to challenge those excluded jurors would have interfered with their ability to select a fair jury in this case.

Second, the specter raised by Respondents of a potentially limitless number of cognizable groups existing at

[4] Whether the Sixth Amendment provides authority to restrict the defense use of the peremptory challenge is an open question but defense abuse of the challenge may be prohibited in the interest of maintaining the balance of the scales between the defense and prosecution. *Hayes* v. *Missouri*, 120 U.S. 681 (1887).

any one time and place is an exaggeration. Every identifiable group is not cognizable for fair cross-section purposes. The concept of distinctiveness is linked to the purposes of the fair cross-section requirement such that exclusion of the group from jury service must contravene those purposes. *Lockhart* v. *McCree*, 476 U.S. 162, 174, 175 (1986). To establish cognizability courts have required a showing of: (1) the presence of some quality which defines and limits the group; (2) cohesiveness of attitudes, ideas or experiences which distinguish the group from the general social milieu; and (3) a community of interest among the members of the group which may not be represented by other segments of society. *United States* v. *Test*, 550 F.2d 577, 591 (10th Cir. 1976). The size of the group is another factor considered. *Taylor*, 419 U.S. at 530. Blacks, women and Mexican-Americans appear to be cognizable groups. *Lockhart*, 766 U.S. at 175.[5]

A juror's group membership would pose no obstacle to his removal if the group of which he is a member did not share such unique and distinctive attitudes or experiences such that those perspectives could not be provided by members of a different group. The appearance of unfairness the fair cross-section requirement is designed to protect against would not be created unless there were a basis to believe the juror had been removed due to his

[5] Courts have declined to find cognizable: young adults, *Barber* v. *Ponte*, 772 F.2d 982 (1st Cir. 1985), *cert. denied*, 475 U.S. 1050, NRA members, *United States* v. *Salamone*, 800 F.2d 1216 (3rd Cir. 1986), blue collar workers and the less educated, *Anaya* v. *Hanson*, 781 F.2d 1 (1st Cir. 1986), persons who choose not to register to vote, *United States* v. *Afflerbach* 754 F.2d 866 (10th Cir. 1985), *cert. denied*, 472 U.S. 1029, and those with lower incomes, recent residents and non-homeowners. *Sands* v. *Cunningham*, 617 F.Supp. 1551 (D.C.N.H. 1985).

group identity rather than individual ability to serve. Given the assimilating and mobile character of American society, it is extremely unlikely that every group defined by ethnicity, religious affiliation, economic or social status, in each and every community at every time and place, would qualify as distinctive, to the extent that removal of a member of that group would deny the defendant the benefit of the common-sense judgment of the community.

Respondents' Brief creates the erroneous impression that cross-sectional values have limited importance, suggesting the fair cross-section requirement may not be paramount to the State's interest in unfettered use of its peremptory challenges. This impression results from Respondents' mistaken analysis of *Williams* v. *Florida*, 399 U.S. 78 (1970) and *Ballew* v. *Georgia*, 435 U.S. 223 (1978), which held a six-person but not a five-person jury constitutionally permissible. (Resp. Br. 22, 23) Respondents contend the line drawn between five and six-person juries was largely arbitrary in that negative impact on the opportunity for a cross-sectional jury is just as great where a jury is reduced in size from twelve to six, as when a jury is reduced from twelve to five. (Resp. Br. 23) Also, the concern that a five-person jury would result in a decreased opportunity for a representative jury ranked only fourth among five factors which convinced the Court in *Ballew* to hold the five-person jury constitutionally inadequate. (Resp. Br. 17)

This Court articulated but did not rank the concerns which determined its conclusion in *Ballew*. Because the concerns expressed by the Court are interrelated it would be impossible to assign a specific weight to each factor. For instance, if the size of a jury interferes with the opportunity for representation of minority groups, the absence of minority groups will also have an impact on the

ability of the jury to engage in effective group deliberation because the biases and prejudices of the jurors would not be counterbalanced by minority viewpoint. *Ballew*, 435 U.S. at 232, 233. Moreover, in *Williams* the six-person jury was not perceived as a threat to minority participation so long as arbitrary exclusion of cognizable groups was impermissible. *Williams*, 399 U.S. at 102. In *Ballew*, the Court learned from studies brought to its attention in the interim that if a minority constituted 10% of the community, 53.1% of randomly selected six-person juries would have no minority representation while 89% would not have two. *Ballew*, 435 U.S. at 237.

Thus, the conclusion reached in *Williams* that there were only negligible differences in twelve and six-person juries was proven incorrect and persuaded the Court to permit no further reduction in jury size. More importantly, the decrease in minority representation resulting from six-person juries was tolerated only because minorities would be unrepresented due to the process of random selection rather than arbitrary exclusion. Where a minority group is excluded by peremptory challenge, the exclusion of the group is not purposeless but deliberate and eliminates any possibility of minority representation.

C. Petitioner's Proposed Standard For Determining Whether The Fair Cross-Section Requirement Has Been Violated Is Consistent With The *Duren* Standard And Does Not Defeat The Purpose Of The Requirement.

Respondents argue that Petitioner's proposed standard for determining whether a fair cross-section violation has occurred is neither principled nor practical. Their primary objection is that it retains the proportionality component of *Duren* while requiring no showing that the disproportionality occurred over a period of time.

Respondents contend that retention of the proportionality requirement in the petit jury context leads to absurd results. (Resp. Br. 27, 28)

The underrepresentation of a cognizable group being the conceptual benchmark for the fair cross-section requirement, *Duren*, 438 U.S. at 364, it would be absurd to abandon the proporationality requirement of *Duren* in any fair cross-section analysis. It is difficult to conceive how one might prove unconstitutional underrepresentation of a cognizable group without some comparison of the percentage of a cognizable group in the community with the percentage of the group represented on the relevant component of the jury.

No inconsistency results from retention of the proprotionality requirement where no demonstration is required that the disproportionality occur over a period of time. The third prong of the prima facie case articulated in *Duren* is that the underrepresentation be due to the systematic exclusion of the group in the jury-selection process, i.e., that it be inherent in the particular jury selection process utilized. *Duren*, 439 U.S. at 366. Evidence that women were underrepresented on jury venires not just occasionally, but consistently over a period of time, furnished proof that the cause of the underrepresentation was the statutory exemption at issue rather than the random selection process. In the petit jury context the cause of the underrepresentation will be obvious. If it is the prosecution's exercise of its peremptory challenge, rather than the random selection process, which causes elimination of a cognizable group from the petit jury, proof of repeated misuse of the peremptory challenge in other cases would be superfluous. Only where the cause of the underrepresentation in a particular case is not apparent is it necessary to resort to proof of a consistent pattern of

disproportionality to demonstrate that the underrepresentation is attributable to the particular selection process utilized.

No absurdity results from retention of the proportionality requirement. Respondents contend the purpose of the fair cross-section requirement is to eliminate group-based peremptory challenges and retention of the proportionality requirement leads to the absurd result of permitting a prosecutor to engage in discriminatory jury selection practices once a group is fairly represented on the venire. (Resp. Br. 28, 31) The purpose of the fair cross-section requirement is not to eliminate discrimination but to provide the accused a jury chosen from a fair community cross section. *Duren*, 439 U.S. at 368. The test proposed by Petitioner should not be subject to criticism for only furthering cross-sectional values while failing to remedy an evil it was not intended to eliminate.[6]

Respondents' assert the proportionality requirement prevents any complaint from being made until the selection of the jury is complete. (Resp. Br. 28) Respondents assume that in every instance it will not be demonstrable until selection is complete that the prosecution is exercising its challenges so as to eliminate the possibility that the jury will reflect a fair community cross section. This premise may often be untrue because it may be apparent

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[6] To the extent that the fair cross-section requirement would prevent a prosecutor from exercising his peremptory challenges to defeat the possibility that the petit jury will reflect a cross-section of the community, it will also tend to eliminate discrimination in jury selection. Knowing that he cannot employ the peremptory challenge to eliminate a cognizable group from the jury, the prosecutor will be forced to make individualized judgments about members of that group in determining whether and which members of the group should be challenged.

during the process of selection that the final composition of the jury will be unrepresentative. More importantly, if Respondents' concern is waste of judicial resources, the remedy is not to eliminate the Sixth Amendment guarantee of a fair and impartial jury, but for the prosecution to refrain from misconduct which will necessitate selection of a jury anew.

II. RETROACTIVE APPLICATION OF THE RULE OF *BATSON* v. *KENTUCKY* SHOULD BE EXTENDED AT A MINIMUM TO THOSE DEFENDANTS WHOSE CONVICTIONS WERE NOT FINAL WHEN CERTIORARI WAS DENIED IN *McCRAY* v. *NEW YORK*.

A. After *McCray*, *Swain* Could Not Be Justifiably Relied On To Sanction A Prosecutor's Discriminatory Use Of The Peremptory Challenge.

Respondents complain that Petitioner has attributed undeserving weight to the denial of certiorari in *McCray* v. *New York*, 461 U.S. 961 (1983) because the opinion of Justice Stevens and the dissent suggest an interest, not in reexamining *Swain*, but in a Sixth Amendment analysis, and therefore did not imply that lower courts were free to reinterpret the Equal Protection Clause, as evidenced by lower courts' unanimous adherence to *Swain*. (Resp. Br. 33, 34)

Petitioner agrees that lower courts did not undertake to reexamine *Swain* in response to *McCray* but believes their reticence is attributable not to the lack of an invitation, but to the reluctance of any lower court to refuse to follow Supreme Court precedent which has not been expressly overruled. *Vail* v. *Board of Education*, 706 F.2d 1435, 1445 (7th Cir. 1983) (Eschbach, J., concurring). Courts naturally gravitated toward the Sixth Amendment analysis which did not have the defect of involving an inevitable collision with *Swain*, but nothing in the

opinions accompanying *McCray* directed lower courts solely toward the Sixth Amendment.

Although Respondents claim the dissenters did not advocate overturning *Swain*, Justice Marshall not only posited the Sixth Amendment would provide a vehicle for reexamining *Swain*, but noted the absurdity inherent in *Swain* of requiring that several suffer discrimination before any defendant could object and that *Swain* was inconsistent with other equal protection cases. *McCray*, 461 U.S. at 965 (Marshall, J., dissenting). Justice Stevens expressed his agreement with Justice Marshall's appraisal of the importance of the issue and did not direct litigants to any particular constitutional theory, but merely noted the current developments in the law.[7]

Petitioner does not argue that merely because a majority of the Justices indicated an interest in reexamining *Swain*, lower courts were free to disregard it. (Resp. Br. 33) Rather, it is the invitation extended to lower courts to serve as laboratories in which the procedural and substantive problems associated with judicial review of peremptory challenges receive further study before the Court would address the issue, that had the effect of destroying the precedential force of *Swain*. If lower courts were to experiment, to test solutions to the problems of discriminatory use of the peremptory challenge, *Swain* could no longer control and could not be relied on to dismiss a claim of discrimination in the exercise of the peremptory challenge.

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[7] Respondents imply that if any invitation existed to reexamine *Swain* it was extended only to state courts (Resp. Br. 33) but fail to explain why Justice Stevens would also note the absence of any conflicting decisions in the federal system as a reason to delay resolution of the issue. 461 U.S. at 962.

Petitioner is not suggesting that *McCray* is paramount to *Batson*, nor is that the issue. (Resp. Br. 34) The issue is whether a case on collateral review can be denied the retroactive benefit of a new rule based on the need for finality and allocation of limited resources, where a distinction is drawn between direct and collateral review on the assumption there is assurance the conviction was perfectly free from error when it become final, *Mackey* v. *United States*, 401 U.S. 667, 689-691 (1971) (Harlan, J., concurring and dissenting), where no such assurance exists because the "old rule" of *Swain* could no longer be relied on to tolerate discrimination.

A fundamental concern in retroactivity analysis is that similarly situated defendants be treated similarly. The unfairness in some defendants effectively receiving the retroactive benefits of *Batson* because their state courts accepted the challenge of *McCray* to provide a remedy for discriminatory peremptory challenge practices, while other similarly situated defendants did not due to their state courts' refusal to provide redress, is evident. The quality of justice an accused receives should not depend on so fortuitous a circumstance and demands that all those affected be provided the remedy of retroactive applicaton of *Batson*.

B. Petitioner's Argument That New Rules Should Be Given Complete Retroactive Effect Is Not Founded In Blackstonian Theory But In The Same Principles Which Persuade That Non-Final Cases Benefit From A New Rule.

Respondents do not address the merits of Petitioner's argument that the same considerations which persuaded this Court to extend the benefits of new rules to all cases not final when the rule is announced, persuade that retroactivity be extended to cases on collateral review. This

argument is made not in reliance on Blackstonian theory (Rep. Br. 32) but merely asks this Court to reexamine whether the concerns which led Justice Harlan to distinguish between cases on direct appeal and collateral review continue to provide a rationale for the distinction. Petitioner maintains those concerns are now adequately addressed by *Wainwright* v. *Sykes*, 433 U.S. 72 (1977).

III. *SWAIN* v. *ALABAMA* PERMITS A PROSECUTOR'S VOLUNTEERED EXPLANATION FOR HIS EXERCISE OF HIS PEREMPTORY CHALLENGES TO BE EXAMINED TO DETERMINE WHETHER THE EXPLANATION IS LEGITIMATE OR A MERE PRETEXT FOR RACIAL DISCRIMINATION.

A. *Swain* Did Not Hold The Assumption That Black Jurors Are Unable To Fairly Judge Black Defendants To Be An Acceptable Trial-Related Consideration Justifying Peremptory Challenge Of Black Jurors Consistent With The Fourteenth Amendment.

Respondents do not deny that an examination of the prosecutor's explanation for his exercise of all ten of his peremptory challenges against black jurors supports the conclusion that the explanation is a mere pretext for racial discrimination. They contend only that *Swain* v. *Alabama*, 380 U.S. 202 (1965) holds that "it is permissible to presume that black jurors will be sympathetic to black defendants and to exercise peremptory challenges on that basis." (Resp. Br. 46) Respondents' view is that *Swain* condemned only "the peremptory excusal of blacks in all cases in the belief that blacks are unqualified to serve in all cases." (Resp. Br. 44)

Swain insulated a prosecutor's challenges from review to preserve the peremptory nature of the challenge and created a presumption that the prosecutor acts on accept-

able trial-related considerations in exercising his challenges against black jurors. *Swain* did not, however, hold that an assumption that a black juror would be unable to fairly judge a black defendant was such an acceptable consideration. As Justice White observed in his concurring opinion in *Batson*:

> . . . *Swain* itself indicated that the presumption of legitimacy with respect to the striking of black venire persons could be overcome by evidence that over a period of time the prosecutor had consistently excluded blacks from petit juries. *This should have warned prosecutors that using peremptories to exclude blacks on the assumption that no black could fairly judge a black defendant would violate the Equal Protection Clause.*

Batson, 476 U.S. at 101 (White, J., concurring) (emphasis added and footnote omitted). Justice White also observed that a prosecutor's belief that blacks could not fairly try a black defendant would be the equivalent of the view that all blacks should be eliminated from the entire venire. 476 U.S. at 101. While no presumption need be indulged that a prosecutor acted on permissible trial-related considerations in removing black jurors because he has volunteered his reasons for their removal, his express or implied acknowledgment that black jurors were challenged on the assumption they could not fairly try a black defendant is not acceptable under *Swain*.

B. The Illinois Appellate Court Held *Swain* Afforded Petitioner No Basis For Relief From His Conviction.

Respondents argue the Illinois appellate court did not reject Petitioner's claim because it found *Swain* dispositive but because "[i]t found dispositive of the issue presented its own decision in an earlier case, and the decisions of the other jurisdictions, rejecting the application of cross-section principles to petit jury selection procedures." (Resp. Br. 40)

Respondents ignore the appellate court's acknowledgement that while *Swain* holds it is "error to exclude a group as a group where it is shown the group has been systematically prevented from jury service or on particular juries . . . [n]o showing of any such systematic action, however, has been made here." *People* v. *Teague*, 108 Ill.App.3d 91, 439 N.E.2d 1066, 1070 (1st Dist. 1982) (citations omitted). The appellate court also interpreted *Swain* to be a bar to recognition of any cross-sectional claim:

> If, as *Payne*[8] holds, the State under the circumstances there posited has to show a basis for its peremptory challenges, then the peremptory challenge has been so effectively emasculated as to destroy its function which *Swain* and Illinois law has recognized.

Teague, 439 N.E.2d at 1070. Thus, the appellate court specifically found no *Swain*-based claim was demonstrated on the record before the court and that *Swain* prevented any interference with a prosecutor's unfettered use of the peremptory challenge in an individual case.

C. Petitioner's *Swain* Claim is Not Barred By Procedural Default Where Respondents Waived This Issue By Their Failure To Timely Raise It In The District Court And Court Of Appeals.

Respondents admit Petitioner filed a habeas corpus petition alleging violation of his Sixth and Fourteenth

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[8] *People* v. *Payne*, 106 Ill.App.3d 1034, 346 N.E.2d 1046 (1st Dist. 1982), *reversed*, 99 Ill.2d 135, 457 N.E.2d 1202 (1983), *cert. denied*, 461 U.S. 1028, which held the Sixth Amendment allowed a trial court to require a prosecutor to explain the reason for his challenge of black jurors if it appeared that the prosecutor acted on the basis of race.

Amendment rights and that *Weathersby* v. *Morris*, 708 F.2d 1493 (9th Cir. 1983) was cited to the district court as a basis for the award of relief to Petitioner, without objection from Respondents. (Resp. Br. 41) Respondents do not claim that Petitioner's equal protection claim is different from that recognized in *Weathersby* and do not explain why it is excused from failing to object to Petitioner's reliance on *Weathersby* in the district court on the ground of procedural default.

Respondents also neglect to reveal that in the court of appeals Petitioner again argued *Weathersby* afforded him a basis for relief and that since the prosecutor volunteered the reasons for his challenges, it need not be presumed he acted for acceptable reasons, but his motives for excusing the black jurors could be examined. Appellant's Brief, p. 25, 26. Respondents did not urge the court of appeals to hold this claim barred by procedural default, but responded to the argument on its merits. Appellee's Brief, pp. 13-15.

Respectfully submitted,

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No. 87-5259

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FRANK DEAN TEAGUE,

Petitioner,

v.

MICHAEL LANE, *et al.*,

Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF *AMICI CURIAE* OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

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32 pp

Question Presented

Whether a prosecutor's use of peremptory challenges to exclude Blacks from jury service because of their race violates the Sixth and Fourteenth Amendments to the Constitution of the United States?

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No. 87-5259

IN THE

SUPREME COURT OF THE UNITED STATES

October Term, 1987

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FRANK DEAN TEAGUE,

Petitioner,

v.

MICHAEL LANE, et al.,

Respondent.

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On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

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BRIEF AMICI CURIAE OF THE NAACP LEGAL DEFENSE AND EDUCATIONAL FUND, INC., AND THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

Interest of the Amici*

The NAACP Legal Defense and Educational Fund, Inc., is a non-profit

*Letters from the parties consenting to the filing of this Brief have been lodged with the Clerk of the Court.

corporation, incorporated under the laws of the State of New York in 1939. It was formed to assist Blacks to secure their constitutional rights by the prosecution of lawsuits. Its charter declares that its purposes include rendering legal aid without cost to Blacks suffering injustice by reason of race who are unable, on account of poverty, to employ legal counsel on their own behalf. For many years its attorneys have represented parties and have participated as amicus curiae in this Court and in the lower federal courts in cases involving many facets of the law.

The Fund has a long-standing concern with the issue of the exclusion of Blacks from service on juries. Thus, it has raised jury discrimination claims in

appeals from criminal convictions,[1] pioneered in the affirmative use of civil actions to end discriminatory practices,[2] and, indeed, represented the petitioner in Swain v. Alabama, 380 U.S. 202 (1965), the case which first raised the issue of the use of peremptory challenges to exclude Blacks from jury venires.

The American Civil Liberties Union (ACLU) is a nationwide, non-partisan organization with over 250,000 members dedicated to the principles of liberty and equality embodied in the Constitution and civil rights laws. As part of its commitment to legal equality, the ACLU has long opposed any and all forms of racial discrimination in the administration of

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1 E.g., Alexander v. Louisiana, 405 U.S. 625 (1972).

2 Carter v. Jury Commission, 396 U.S. 320 (1970); Turner v. Fouche, 396 U.S. 346 (1970); Mitchell v. Johnson, 250 F. Supp. 117 (M.D. Ala. 1966).

justice. Of particular relevance here, the ACLU represented petitioner in McCray v. Abrams, 750 F.2d 1113 (2d Cir. 1984), vacated and remanded, 106 S.Ct. 3289 (1986), the first federal case holding that a prosecutor's use of peremptory challenges to screen prospective jurors on racial grounds violates the Sixth Amendment.

SUMMARY OF ARGUMENT

I.

The use of peremptory challenges to affirmatively create an unrepresentative jury by striking Blacks violates the Sixth Amendment. This Court has held on a number of occasions that there is no constitutional right that the particular jury that tries a defendant minor the community from which jurors are drawn. However, when the fair opportunity to obtain a representative jury is thwarted

by the exclusion of Blacks at the final selection stage, then the result is precisely the same as if the jury pool itself were unrepresentative. Therefore, the basic right guaranteed by the Sixth Amendment is violated.

II.

The action of the prosecutor in this case violated Swain v. Alabama, 380 U.S. 202 (1965). Nothing in that decision requires the result that an admission by the prosecutor that a Black venireman was excluded because of race did not establish a violation of the Fourteenth Amendment. To the contrary, such an admission is direct evidence of intentional discrimination and is the strongest evidence on which to base a holding that the equal protection clause has been violated.

I.

THE EXCLUSION OF BLACK JURORS VIOLATES THE RIGHT TO HAVE A JURY REPRESENTATIVE OF THE COMMUNITY.

The question presented by this case may be simply stated: if the use of peremptory challenges to exclude Blacks results in juries that are unrepresentative of the community, does the practice violate the Sixth Amendment, which is applicable to the states through the Fourteenth. [3]

Taylor v. Louisiana, 419 U.S. 522 (1975), held that "[t]he unmistakable import of this Court's opinions, at least since 1940 . . . is that the selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." 419 U.S. at 528. In Smith

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[3] Duncan v. Louisiana, 391 U.S. 145 (1968); Taylor v. Louisiana, 419 U.S. 522 (1975).

v. Texas, 311 U.S. 128, 130 (1940), the Court declared that exclusion of racial groups from jury service was "at war with our basic concepts of a democratic society and a representative government." Ballard v. United States, 329 U.S. 187 (1946), reversed a conviction by a jury from which women had been excluded, relying on a federal statutory "design to make the jury a 'cross-section of the community.'" In Brown v. Allen, 344 U.S. 443, 474 (1953), the Court asserted that the source of jury lists must "reasonably reflect . . . a cross-section of the population suitable in character and intelligence for that civic duty."

In Taylor the Court also relied on its decision in the six-person jury case, which had stated that a jury should "be large enough to promote group deliberation . . . and to provide a fair possibility

for obtaining a representative cross-section of the community." Williams v. Florida, 399 U.S. 78, 100 (1970). (Emphasis added.) On the basis of this precedent, the Court declared:

> We accept the fair-cross-section as fundamental to the jury trial guaranteed by the Sixth Amendment and are convinced that the requirement has solid foundation. The purpose of a jury is to guard against the exercise of arbitrary power -- to make available the common sense judgment of the community as a hedge against the over-zealous or mistaken prosecutor . . . This prophylactic vehicle is not provided if the jury pool is made up of only special segments of the populace or if large, distinctive groups are excluded from the pool. Community participation in the administration of the criminal law, moreover, is not only consistent with our democratic heritage but is also critical to public confidence in the fairness of the criminal justice system . . . [T]he broad representative character of the jury should be maintained, partly as assurance of a diffused impartiality and partly because sharing in the administration of justice is a phase of civic responsibility.' Thiel v. Southern Pacific Co., 328 U.S. 217, 227 (1946) (Frankfurter, J., dissenting).

Taylor v. Louisiana, 419 U.S. at 530-31.

The requirement of a fair cross-section in jury selection has also been adopted by statute as "the policy of the United States." [4] Taylor quoted approvingly from the House Report on the Federal Jury Selection and Service Act.

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[4] Federal Jury Selection and Service Act of 1968, Pub. L. 90-274, 82 Stat. 53, 28 U.S.C. §§ 1861 et seq. Section 1862 provides that:

> No citizen shall be excluded from service as a grand or petit juror . . . on account of race, color, religion, sex, national origin, or economic status.

See also, Section 2 of the Uniform Jury Selection and Service Act (National Conference of Commissioners on Uniform State laws, 1970), and Md. Ann. Code § 8-1-13. The Uniform Act has been substantially adopted by eight states. Colo. Rev. St. §§ 13-71-107 to 13-71-121 (1971); Idaho Code §§ 2-201 to 2-221 (1971); Hawaii Rev. Stat. §§ 612-1 to 612-26 (1973); Indiana Code §§ 33-4-5.5-1 to 33-4-5.5-22 (1973); 14 Maine Rev. St. §§ 1211 et seq. (1971); Minn. Stat. Ann. §§ 593-31 to 593-50 (1977); Miss. Code 1972, §§ 13-5-2 et seq. (1974); No. Dakota Code §§ 17-09.1-01 to 27-09.1-22 (1971).

> It must be remembered that the jury is designed not only to understand the case, but also to reflect the community's sense of justice in deciding it. As long as there are significant departures from the cross sectional goal, biased juries are the result -- biased in the sense that they reflect a slanted view of the community they are supposed to represent.

419 U.S. at 26 n. 37.

The conclusion that the Sixth Amendment bars the use of peremptory challenges to exclude Blacks from the jury that will sit is not inconsistent with decisions of this Court, relied upon by the court below, which hold that the defendant has no right to have his particular jury represent the community with precision. [5] Thus, for example, in a

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[5] Apodaca v. Oregon, 406 U.S. 404, 413 (1972) (plurality opinion); Fay v. New York, 332 U.S. 261, 284 (1947); Lockhart v. McCree, 476 U.S. __, 90 L.Ed.2d 137 (1986). For a careful analysis of this Court's Sixth Amendment decisions, see McCray v. Abrams, 750 F.2d 1113 (2d Cir 1984, vacated and remanded, 106 S.Ct. 3289 (1986).

community in which one third of the persons eligible for jury service are Black there is no absolute right to have a jury with four Blacks out of the 12 jurors.

Although this proposition is correct, it does not negate the conclusion that the affirmative use of peremptory challenges to produce an unrepresentative jury violates the Sixth Amendment. What this Court has held is that, assuming a system of jury selection that results in jury lists that are representative of the community, the use of a neutral device to select particular juries does not violate the Fourteenth Amendment just because in a particular case the jury may not precisely mirror that community. [6] Put another way, although there is an affirmative

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[6] See, e.g., Taylor v. Louisiana, 419 U.S. at 538.

obligation to have a process by which a representative jury can be chosen, there is not an affirmative obligation to achieve the result of juries that are precisely representative.

But the converse must also be true: there is a right not to have selection methods that result in unrepresentative juries. The protections of the Sixth and Fourteenth Amendments cannot stop with the composition of the jury roll, but extend to the selection of the specific jury itself. See Ballew v. Georgia, 435 U.S. 223 (1978); Alexander v. Louisiana, 405 U.S. 625 (1972). Thus, a defendant has the right to a fair opportunity for a jury on which are represented the various groups that make up the community in which he is tried. To allow the unscrutinized use of peremptory challenges on the basis of race biases the process as surely as

the exclusion of Blacks from the jury lists. Lockhart v. McCree, 476 U.S. ___, 90 L.Ed.2d 137 (1986), hardly requires this result. Fairly read, the statement in Lockhart that "extension of the fair cross-section requirement to petit juries would be unworkable and unsound," id. at 148, only rejected the notion of proportional representation on the petit jury. Id. It did not reject, or even address the claim presented by petitioner here. Thus, this Court did not cite Lockhart when it remanded for "further consideration in light of" Batson and Allen v. Hardy, 478 U.S. ___, 92 L.Ed.2d 199 (1986), two cases holding that the discriminatory use of peremptory challenges violates the Sixth Amendment. See Abrams v. McCree, 92 L.Ed.2d 705 (1986); Michigan v. Booker, 92 L.Ed.2d 705 (1986).

The right to a fair cross-section is not based on the notion that individuals vote to convict or acquit because of the racial group to which they belong; rather, it derives from the principle that juries should contain representatives of the various groups in the community so that their opinions, voices, points of view, and perceptions come to bear on the deliberative process. When a prosecutor removes Blacks from the jury the result is a jury which is insulated from one of those viewpoints and voices. [7]

The question of whether the use of peremptory challenges has violated the cross-section requirement will, after all, only arise in a particular case when a

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[7] Peters v. Kiff, 407 U.S. 493, 503-04 (1972); see Sullivan, Deterring the Discriminatory Use of Peremptory Challenges, 21 Am. Crim. L. Rev. 477 (1984), for an example of the impact on a jury's deliberations of the experiences of a black juror.

fair system has produced a panel of potential jurors that includes Blacks. Unless the prosecutor strikes them, a representative jury will sit. If then the prosecutor makes the jury unrepresentative by striking some or all of the Blacks, his abuse of the peremptory challenge violates the Sixth Amendment.

To illustrate, one may assume a county that is 20% black and that has a jury roll that is also 20% black. In trial #1, 20 potential jurors are randomly selected, one of whom is black, a result well within the range of probability. That single Black is excused for a valid, racially-neutral reason, and an all-white jury sits. That result does not violate the Sixth Amendment.

In trial #2, twenty potential jurors are randomly selected, 4 of whom, or 20%, are black. Through neutral selection

criteria 2 of the 12 jurors to sit will be black, or almost 20%. The prosecutor then affirmatively creates a non-representative jury by striking the two Blacks for racial reasons. That result does violate the Sixth Amendment. To hold otherwise would render wholly abstract and nugatory the right to jury rolls that represent a cross-section of the community, since the benefit that flows from that right -- a fair number of juries on which Blacks actually sit -- can always be thwarted.

II.

SWAIN DOES NOT REQUIRE THE COURT TO IGNORE A PROSECUTOR'S VOLUNTARY ADMISSION OF RACIAL DISCRIMINATION IN THE EXERCISE OF PEREMPTORY CHALLENGES

In addition to the Sixth Amendment argument discussed above, petitioner also challenges the prosecutor's use of peremptory challenges on equal protection grounds. The narrow issue now presented

for review is whether this Court's decision in Swain v. Alabama, 380 U.S. 202 (1965), was meant to foreclose an equal protection claim even when the prosecutor candidly acknowledges that his or her use of peremptory challenges was prompted by racially discriminatory motives.

Clearly, any such admission would be dispositive after Batson v. Kentucky, 476 U.S. 79 (1986). The Seventh Circuit, however, has classified petitioner as one of a class of defendants who cannot take advantage of Batson because their direct appeals were completed before Batson was decided. See Allen v. Hardy, 478 U.S. ___, 92 L.Ed. 2d 199 (1986). Under these circumstances, the Seventh Circuit ruled that even an open admission of racial discrimination in jury selection could not give rise to an equal protection claim. 820 F.2d at 834 n. 6. Nothing in the

ruling or reasoning of Swain compels that result. Even if the question were closer than it is, the fact that Swain has now been overruled surely argues against an unduly restrictive interpretation of its discredited holding.

Fairly read, Swain is a case about evidentiary presumptions. It is not a case endorsing discrimination in jury selection. Indeed, the majority opinion in Swain begins by restating the Court's longstanding view that "a State's purposeful or deliberate denial to Negroes on account of race of participation as jurors in the administration of justice violates the Equal Protection Clause." 380 U.S. at 203-4. [8]

The concern in Swain was how that

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[8] This principle traces back at least as far as Strauder v. West Virginia, 100 U.S. 303 (1880), which struck down a state statute barring blacks from jury service.

principle could best be enforced in the context of peremptory challenges. In particular, the Court was anxious to preserve "[t]he essential nature of the peremptory challenge [as] one exercised without a reason stated . . ." Id. at 220. Accordingly, the Court held that the mere "allegation" that peremptory challenges were being used in a particular case to exclude prospective black jurors was insufficient to establish a prima facie case of discrimination. Id. at 222. Rather, under Swain, the presumption that a prosecutor's use of peremptory challenges is constitutionally legitimate can only be overcome by proof that all blacks within a given jurisdiction are being barred from jury service "in case after case, whatever the circumstances, whatever the crime and whoever the defendant or the victim may be . . ." Id.

at 223.

The tension in Swain between enforcing the principle of non-discrimination and preserving the peremptory as a challenge for which no reason need be given does not exist when the prosecutor voluntarily offers a reason for the peremptory challenge that, on its face, is racially discriminatory. At that point, the presumption of regularity articulated by Swain necessarily disappears unless it is irrebuttable. Yet clearly, Swain did not create an irrebuttable presumption or it would not have permitted even systemic proof of racial discrimination.[9]

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[9] Swain could also be read as holding that the statistical disparities arising in a single case are ordinarily not strong enough to support an inference of invidious intent without corroboration, and that the transactional cost of obtaining corroboration was simply too high for the Court to accept. A voluntary admission of discriminatory motive, however, solves the evidentiary problems and eliminates the transactional costs.

As Justice White, the author of Swain, noted in Batson: "Swain itself indicated that the presumption of legitimacy with respect to the striking of black venire persons could be overcome by evidence that over a period of time the prosecution had consistently excluded blacks from petit juries." 106 S.Ct. at 1725. In a critical footnote, Justice White then added: "Nor would it have been inconsistent with Swain for the trial judge to invalidate peremptory challenges of blacks if the prosecutor, in response to an objection to his strikes, stated that he struck blacks because he believed that they were not qualified to serve as jurors, especially in the trial of a black defendant." Id. at n. *.

The view of Swain articulated by

Justice White is also the prevailing one in the circuits. For example, in Wethersby v. Morris, 708 F.2d 1493, 1496 (9th Cir. 1983), the Ninth Circuit concluded that the necessity of proving a pattern and practice of racial discrimination to satisfy Swain only becomes relevant if the prosecutor's motives in a particular case are not otherwise disclosed. Once the state has confessed its racial animus, there is no need to rely on circumstantial evidence. [10] In the apt words of the Ninth Circuit: "a court need not blind itself to the obvious . . ." Ibid. [11]

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[10] Cf. McClesky v. Kemp, 107 S.Ct. 1756, 1766 (1987) (rejecting equal protection challenge to capital sentence because defendant relied "solely" on statistics and did not offer any evidence "specific to his own case").

[11] Similarly, in United States v. Greene, 626 F.2d 75, 76 (8th Cir.), cert. denied, 449 U.S. 876 (1980), the court implied that Swain would not preclude

Indeed, amici are aware of no case in any context in which this Court has ever said that the government's voluntary confession of racial discrimination is constitutionally irrelevant. Even in cases like Plessy v. Ferguson, 163 U.S. 597 (1896), the fiction of equal treatment was integral to the state's defense and essential to the Court's ruling. Disregarding this tradition, the Seventh Circuit has advanced an interpretation of

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relief if the record revealed that the prosecutor's use of peremptory challenges was impermissibly based on race in even a single case. But see United States v. Danzey, 476 F. Supp. 1065 (E.D.N.Y. 1979), aff'd, 620 F.2d 286 (2d Cir.), cert. denied, 449 U.S. 878 (1980). Interestingly, the judge who decided Danzey was also the first federal judge to rule that the fair cross-section requirement of the Sixth Amendment barred the state from using its peremptory challenges in a racially discriminatory fashion. See McCray v. Abrams, 576 F. Supp. 1244 (E.D.N.Y. 1983), aff'd in part and rev'd in part, 750 F.2d 1113 (2d Cir. 1984), vacated and remanded, 92 L.Ed.2d 705 (1986).

Swain that condemns discrimination if it is based on statistics but condones discrimination if it is openly acknowledged. Especially after Batson, this Court should not affirm such an illogical approach, which is difficult to reconcile with Swain and impossible to reconcile with the equal protection goals of the Fourteenth Amendment.

Conclusion

For the foregoing reasons, the decision below should be reversed.

Respectfully submitted,

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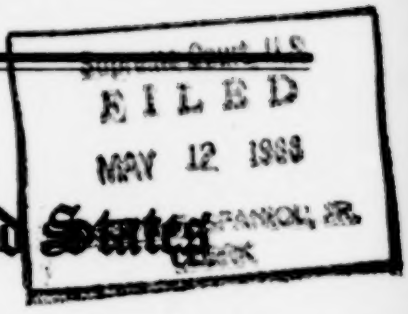

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

FRANK DEAN TEAGUE,

Petitioner,

v.

MICHAEL LANE, Director,
Department of Corrections, et al.,

Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE

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No. 87-5259

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Respondents.

On Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

BRIEF FOR THE LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW AS AMICUS CURIAE

STATEMENT OF INTEREST OF AMICUS CURIAE

The Lawyers' Committee for Civil Rights Under Law was organized in 1963, at the request of the President of the United States, to involve private attorneys in the national effort to assure the civil rights of all Americans.

During the past 25 years, the Lawyers' Committee and its local affiliates have enlisted the services of thousands of members of the private bar to address the legal problems of minorities and the poor. The Committee's membership includes former presidents of the American Bar Association, a number of law school deans, and many of the nation's leading lawyers. The importance to our criminal justice system of having criminal verdicts rendered by juries untainted by discrimination, and the widespread perception that prosecutors have practiced discrimination in the exercise of peremptory challenges, prompted the Lawyers' Committee to file briefs *amicus curiae* in *Batson v. Kentucky*, 476 U.S. 79 (1986), and *Griffith v. Kentucky*, 107 S. Ct. 708 (1987). Similar concerns for the integrity of our criminal justice system have prompted the Lawyers' Committee to file a brief *amicus curiae* in this case. The parties have consented to the filing of this brief, which is therefore submitted pursuant to Supreme Court Rule 36.2.

STATEMENT

Petitioner Frank Dean Teague, a black man, was convicted of armed robbery and attempted murder by an all-white Illinois state jury (J.A. 15). He was sentenced to two concurrent terms of 30 years' imprisonment. *People v. Teague*, 108 Ill. App. 3d 891, 893, 439 N.E.2d 1066, 1068 (1st Dist. 1982), *cert. denied*, 464 U.S. 867 (1983).

Although the venire in petitioner's case included 11 black veniremen, the State peremptorily struck 10 of them, using each and every one of the 10 peremptory

challenges then allowed by Illinois law. *See* Ill. Rev. Stat. ch. 38, ¶ 115-4(e) (1985).[1] When petitioner objected to this discrimination, the prosecutor volunteered a series of purportedly neutral explanations for excusing the 10 black veniremen (J.A. 3-4). The trial court overruled petitioner's objections, but made no finding as to the validity of the prosecutor's "explanations" (J.A. 4).

On appeal, the Illinois Appellate Court indicated that the prosecutor's "explanations" were dubious, but affirmed the conviction on the ground (Pet. App. A, at 2) that petitioner had not shown the systematic exclusion in case after case required by *Swain v. Alabama*, 380 U.S. 202 (1965). Following the denial of a petition for rehearing, the Illinois Supreme Court denied leave to appeal (J.A. 15), and, in October 1983, this Court denied certiorari (J.A. 15).

In March 1984, petitioner filed a habeas corpus petition in the United States District Court for the Northern District of Illinois. Petitioner claimed that the State had violated his Sixth Amendment right to be tried by a jury chosen from a fair cross-section of the community, and his Fourteenth Amendment right to the equal protection of the laws. The district court granted summary judgment in favor of the State, holding that petitioner's claims were foreclosed by *Swain* and Seventh Circuit case law (J.A. 5-6).

On appeal, a divided panel of the Seventh Circuit held that petitioner had established a *prima facie* violation of the Sixth Amendment fair cross-section requirement and

[1] The eleventh black venireman, the wife of a police officer, was struck by petitioner, who was accused of the attempted murder of police officers (Pet. 2-3).

remanded the case for a hearing (Pet. App. A, at 24-30).[2] The State filed a petition for rehearing *en banc*, which was granted in December 1985 (J.A. 7-8). Subsequently, while petitioner's case was pending before the *en banc* court, this Court announced its decision in *Batson v. Kentucky*, 476 U.S. 79 (1986). By divided vote, however, the *en banc* court reversed the panel decision and affirmed the decision of the district court (J.A. 36). First, the *en banc* court held, as a matter of law, that the State's discriminatory exercise of its peremptory challenges did not violate the Sixth Amendment fair cross-section requirement (J.A. 34-36). Second, the court held that this Court's decision in *Batson* did not apply to petitioner's Fourteenth Amendment claim, which was therefore controlled by *Swain* (J.A. 16 & n.4). Finally, the court held that petitioner was not entitled to relief on his equal protection claim because, even assuming that the claim was not procedurally barred, petitioner had not established systematic exclusion in case after case, as required by *Swain* (J.A. 17 n.6).

On March 7, 1988, this Court granted certiorari (J.A. 54).

[2] The Seventh Circuit panel ordered a remand because of the "relative novelty" of its holding, but noted that, "on the present facts, a remand would be unnecessary and perhaps undesirable in allowing the state to conjure up a rationale having little to do with the reality at trial if all parties at trial had prior notice of [the] holding" (Pet. App. A, at 27-28).

INTRODUCTION AND SUMMARY OF ARGUMENT

For more than a century, beginning with its decision in *Strauder v. West Virginia*, 100 U.S. 303 (1880), this Court has consistently condemned discrimination in jury selection procedures because a criminal defendant has a constitutional "right to be tried by a jury whose members are selected pursuant to non-discriminatory criteria." *Batson*, 476 U.S. at 85-86. *See also Martin v. Texas*, 200 U.S. 316, 321 (1906) (Fourteenth Amendment); *Ex parte Virginia*, 100 U.S. 339, 345 (1880) (same); *Duren v. Missouri*, 439 U.S. 357, 363-64 (1979) (Sixth Amendment); *Taylor v. Louisiana*, 419 U.S. 522, 530 (1975) (same).

In *Swain v. Alabama*, the Court reaffirmed this longstanding principle, but sought at the same time to afford special protection to the State's peremptory challenge privilege by creating a presumption that the State's use of peremptory challenges be deemed proper in any individual case. *Swain*, 380 U.S. at 221-22. Lower courts subsequently interpreted *Swain* as holding that discrimination could be established in this context only by proving its existence in case after case, and thus precluded the granting of relief in any particular case (absent such statistical evidence), even if the State's challenges in the particular case could not be explained except as invidious discrimination. *See Batson*, 476 U.S. at 92.

In *Batson*, this Court acknowledged the "crippling burden of proof" which *Swain* and its progeny had imposed on defendants, and concluded that each defendant must be allowed to prove discrimination on the facts of his own case. *Id.* at 92-98. The Court therefore fundamentally altered the balance which *Swain* had struck between the

peremptory challenge privilege and the constitutional right to be free from invidious discrimination, and confirmed the primacy of the latter.

In the case at bar, the Seventh Circuit improperly declined to give effect to *Batson* and the long line of cases upon which its rationale is based. Indeed, the Seventh Circuit expressly based its decision (J.A. 31-34) upon its view of the peremptory challenge as a sacrosanct privilege which need not give way to constitutional requirements. Reversal is required for three separate reasons.

First, the State's deployment of its peremptory challenges violated the Sixth Amendment. Under the Sixth Amendment, as this Court held in *Taylor*, 419 U.S. at 527, a criminal defendant is entitled to be tried by a jury drawn from a fair cross-section of the community. While the fair cross-section principle does not require that any particular petit jury actually include members of any particular group, it does ensure the "fair possibility" that the jury will be comprised of various distinct community groups, and thus prohibits the State from affirmatively acting to subvert that possibility. Because the prosecutor's use of peremptory challenges effectively eliminated any possibility that blacks could sit on the petit jury in this case, petitioner established a *prima facie* violation of the Sixth Amendment.

Second, the facts of this case established a *prima facie* equal protection violation. Contrary to the Seventh Circuit's decision, petitioner was not required by *Swain v. Alabama* to prove discrimination by showing exclusion in case after case: (1) The Court's decision in *Batson* is controlling here, rather than *Swain*, because a central purpose of *Batson* was to eliminate racial discrimination from the criminal justice system, a goal which is central to our "concept of ordered liberty" and thus requires retroactive treatment; (2) *Batson*, rather than *Swain*, must be

applied to this case for the additional reason that *Batson* protects and enhances the truth-seeking goal of the criminal justice system; and (3) Regardless of whether retroactive application of *Batson* would otherwise be required, such application is required in the extraordinary circumstances of this case because the courts below perfunctorily applied the *Swain* presumption after a majority of this Court had indicated in *McCray v. New York*, 461 U.S. 961 (1983), that *Swain* should not be blindly followed.

Third, even if the *Swain* decision controls petitioner's equal protection claim, it was error for the trial court to rely on the *Swain* presumption when the prosecutor expressly invited the court to adjudge the validity of his volunteered "explanations."

ARGUMENT

I.

THE STATE'S USE OF ALL ITS PEREMPTORY CHALLENGES TO EXCLUDE 10 BLACK VENIREMEN VIOLATED THE SIXTH AMENDMENT.

A. The Sixth Amendment Fair Cross-Section Requirement Guarantees The "Fair Possibility" That The Petit Jury Will Reflect A Fair Cross-Section Of The Community.

The Sixth Amendment guarantees to each criminal defendant the right to trial by an impartial jury of his peers. U.S. Const. amend. VI.[3] That right necessarily "con-

[3] It is indeed significant that *Swain*, a Fourteenth Amendment equal protection case, was decided in 1965, three years before this Court held that the Sixth Amendment was applicable to the states. *See Duncan v. Louisiana*, 391 U.S. 145, 149 (1968). Thus, there was no reason in *Swain* for this Court to test its holding in that case against the requirements of the Sixth Amendment.

templates a jury drawn from a fair cross section of the community." *Taylor*, 419 U.S. at 527. *See also Williams v. Florida*, 399 U.S. 78, 100 (1970). In *Taylor v. Louisiana*, this Court recognized that the "fair-cross-section requirement [not only is] fundamental to the jury trial guaranteed by the Sixth Amendment," but is mandated by the central purpose of the jury system, which is "to guard against the exercise of arbitrary power—to make available the commonsense judgment of the community as a hedge against the overzealous or mistaken prosecutor and in preference to the professional or perhaps over conditioned or biased response of a judge." *Taylor*, 419 U.S. at 530. *See also Duncan v. Louisiana*, 391 U.S. 145, 155-56 (1968).

This Court, of course, has never construed the fair cross-section principle to require that any particular petit jury include members of any particular group. Nonetheless, the Court repeatedly has emphasized that the Sixth Amendment prohibits the State from acting affirmatively to defeat the "fair possibility" that the petit jury will reflect a fair cross-section of the community. *Ballew v. Georgia*, 435 U.S. 223, 239 (1978); *Taylor*, 419 U.S. at 528. *See also Peters v. Kiff*, 407 U.S. 493, 500 (1972); *Williams*, 399 U.S. at 100. Indeed, the preservation of that "fair possibility" is central to the integrity of the jury system because exclusion of groups "for reasons completely unrelated to the ability of members of the group to serve as jurors in a particular case . . . raise[s] at least the possibility that the composition of juries would be arbitrarily skewed in such a way as to deny criminal defendants the benefit of the common-sense judgment of the community." *Lockhart v. McCree*, 476 U.S. 162, 175 (1986).

In giving effect to the Sixth Amendment, and, more specifically, to guard against this kind of imbalance, this Court has carefully restricted those State practices—

whether intentional or not—which tend to exclude or dilute representation of diverse community groups. In *Taylor v. Louisiana*, for example, the Court invalidated the conviction of a male defendant who had been tried by a jury selected from a venire from which most women had been excluded by statute. 419 U.S. at 538. *See also Duren*, 439 U.S. at 370 (underrepresentation of women on the venire violates the Sixth Amendment fair cross-section requirement). Further, in *Ballew v. Georgia*, the Court held that the Sixth Amendment prohibits the use of a five-person petit jury in a criminal misdemeanor trial. Although there was no suggestion in *Ballew* that the venire did not represent a fair cross-section, the Court nonetheless concluded that the size of the petit jury raised an unconstitutional possibility that the jury might reach an inaccurate or biased decision, or might not truly represent the community. *Ballew*, 435 U.S. at 239.[4]

By restricting State action which eliminates or dilutes the fair possibility that the jury will truly reflect the composition of the community, the Sixth Amendment fair cross-section requirement promotes the interests of pluralism which are essential both to the integrity of our jury system and to public confidence in it. *See Taylor*, 419 U.S. at 530-31.

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[4] Although there was no majority opinion in *Ballew*, six members of the Court believed that Georgia's five-person jury violated the Sixth Amendment. *See* 435 U.S. at 239 (Blackmun, J., joined by Stevens, J.); *id.* at 245 (White, J.); *id.* at 246 (Brennan, J., joined by Stewart and Marshall, JJ.). Moreover, the three remaining members of the Court, Chief Justice Burger and Justices Powell and Rehnquist, noted that the reduced size of the jury raised "grave questions of fairness." *Id.* at 245.

B. Because The Peremptory Challenge Is A Non-Constitutional Privilege, Its Exercise Is Strictly Subject To Constitutional Limitations.

When used properly, the peremptory challenge, like the fair cross-section requirement, promotes the integrity and reliability of the jury system. It is well-established, however, that there is no constitutional right to the exercise of peremptory challenges. *Batson*, 476 U.S. at 91; *Swain*, 380 U.S. at 219; *Stilson v. United States*, 250 U.S. 583, 586 (1919). The peremptory challenge is solely a creature of legislative grace, which must be schooled in constitutional ways.

In *Swain*, the Court sought to accommodate the divergent interests embodied in the constitutional right to be free from invidious discrimination, on the one hand, and in the State's privilege of exercising peremptory challenges, on the other hand. The Court reaffirmed that the Constitution prohibits racial discrimination in jury selection, but also emphasized the wide discretion which the peremptory challenge historically has entailed. The Court therefore held that the use of peremptory challenges in any given case should be presumed proper, and not subject to judicial scrutiny. 380 U.S. at 221-22. The Court indicated, however, that discrimination in case after case would require judicial scrutiny. *Id.* at 223-24.

Experience with the *Swain* presumption showed that the balance struck in *Swain* was too one-sided, and effectively eviscerated constitutional protections. Contrary to constitutional principles, prosecutors frequently exercised their peremptory challenges to practice racial discrimination.[5] At the same time, the "crippling" burden imposed by *Swain* made it virtually impossible for criminal defendants to enforce their constitutional rights. *Batson*, 476 U.S. at 92-93.

[5] As this Court observed in *Batson*, "[t]he reality of practice, amply reflected in many state and federal court opinions, shows that the [peremptory] challenge . . . at times has been . . . used

(Footnote continued on following page)

In *Batson*, the Court therefore reassessed the balance struck in *Swain*. In doing so, the Court stated unequivocally that the peremptory challenge may be exercised only within constitutional bounds, 476 U.S. at 89, and emphasized anew that exclusion of jurors solely because of their race is *never* constitutionally permissible, even in a single, isolated case. *Id.* at 95. The practically insurmountable presumption and burden of proof imposed by *Swain* had effectively condoned discrimination in individual cases by "largely immun[izing] [peremptory challenges] from constitutional scrutiny," *id.* at 92-93, and thus tempted prosecutors to locate an optimal level of discrimination (one which would achieve their invidious purposes without triggering judicial scrutiny).[6] Thus, the *Batson* Court adopted

[5] *continued*
to discriminate against black jurors." 476 U.S. at 99. Experience in the State of Illinois shows that the Court's observation in *Batson* may well have understated the magnitude of the problem. *See People v. Frazier*, 127 Ill. App. 3d 151, 156-57, 469 N.E.2d 594, 598-99 (1st Dist. 1984) (cataloguing 36 Illinois cases between 1980 and 1984, in which discriminatory use of peremptory challenges by prosecutor was in issue); *People v. Johnson*, 148 Ill. App. 3d 163, 179 n.2, 498 N.E.2d 816, 826-27 n.2 (1st Dist. 1986) (cataloguing 22 additional Illinois cases).

[6] In other words, the practical effect of *Swain* was not to discourage prosecutors from practicing discrimination, but to encourage them to practice discrimination with circumspection. Thus, prosecutors refrained from discriminating in "case after case," and limited their discrimination to cases where it would matter most, that is, where the prosecution's evidence was weak and the facts most susceptible to manipulations of racial prejudice. *See Commonwealth v. Martin*, 461 Pa. 289, 299, 336 A.2d 290, 295 (1975) (Nix, J., dissenting) ("[t]he glaring weakness in the *Swain* rationale is that it fails to offer any solution where the discriminatory use of peremptory challenges is made on a selected basis").

a more effective means of ensuring constitutional compliance. *Id.* at 95. In doing so, the Court firmly rejected any notion that the peremptory challenge is to be held inviolate, and confirmed that constitutional commands must take precedence over non-constitutional privileges. *See* U.S. Const. art. VI, cl. 2; *Marbury v. Madison*, 1 U.S. (1 Cranch) 267, 285-86 (1803).

C. The Prosecutorial Use Of Peremptory Challenges In A Manner That Undermines The Fair Cross-Section Requirement Violates The Sixth Amendment, And Must Therefore Be Subject To Limitation.

Unless the State may accomplish through the indirection of peremptory challenges what it cannot do directly in empaneling a venire or legislating the size of the petit jury—eliminate the fair possibility that the petit jury will reflect a fair cross-section of the community—the Sixth Amendment must be construed to impose limitations on the use of peremptory challenges. *Cf. Lane v. Wilson*, 307 U.S. 268, 275 (1939) (Frankfurter, J.) (the Constitution prohibits "sophisticated as well as simple-minded modes of discrimination"). Otherwise, the fair cross-section requirement would be a dead letter because the deployment of peremptory challenges against a particular racial group can undercut that requirement "to the same extent . . . [as if the group] had not been included on the jury list at all." *United States v. Green*, 742 F.2d 609, 611 n.* (11th Cir. 1984) (citations omitted).[7] Two courts of appeals have

[7] Indeed, this Court noted in *Swain* that peremptory challenges have been used in this country with a greater vengeance than in the United Kingdom because American jury pools are drawn from "a greater cross-section of a heterogeneous society." *Swain*, 380 U.S. at 218 (footnote omitted). In the case at bar, the Seventh Circuit went so far as to assert that the fair cross-section requirement "increases the *necessity* of employing peremptories" (J.A.

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recognized this fact and have imposed limitations, under the Sixth Amendment, to prevent peremptory challenges from being deployed as a means of abridging the fair cross-section requirement. *McCray v. Abrams*, 750 F.2d 1113, 1130-31 (2d Cir. 1984), *vacated*, 106 S. Ct. 3289 (1986);[8] *Booker v. Jabe*, 775 F.2d 762, 767-71 (6th Cir. 1985), *vacated*, 106 S. Ct. 3289, *opinion reinstated*, 801 F.2d 871 (6th Cir. 1986), *cert. denied*, 107 S. Ct. 910 (1987).[9]

If the fair cross-section requirement is to achieve its constitutional purpose, each defendant must be allowed to challenge the discriminatory use of peremptory challenges in his own case, whenever their use eliminates or substantially dilutes the participation of any particular racial group on the petit jury.[10] Consistent with this

[7] *continued*
33; emphasis added). However, any suggestion that the peremptory challenge may properly be used to subvert the fair cross-section requirement cannot stand. That requirement is both constitutionally mandated and grounded in "the very idea of a jury." *Carter v. Jury Comm'n*, 396 U.S. 320, 330 (1970).

[8] In *Roman v. Abrams*, 822 F.2d 214, 225 (2d Cir. 1987), the Second Circuit reaffirmed the continued validity of *McCray*.

[9] A number of state appellate courts have reached the same conclusion. *See People v. Wheeler*, 22 Cal. 3d 258, 276-77, 148 Cal. Rptr. 890, 903, 583 P.2d 748, 761-62 (1978); *Fields v. People*, 732 P.2d 1145, 1153-55 (Colo. 1987); *Riley v. State*, 496 A.2d 997, 1012 (Del. 1985), *cert. denied*, 106 S. Ct. 3339 (1986); *State v. Neil*, 457 So. 2d 481, 486-87 (Fla. 1984); *Commonwealth v. Soares*, 377 Mass. 461, 488, 387 N.E.2d 499, 516, *cert. denied*, 444 U.S. 881 (1979); *State v. Gilmore*, 103 N.J. 508, 526-29, 511 A.2d 1150, 1159-60 (1986) (all recognizing defendant's right, under the Sixth Amendment or equivalent state constitutional provisions, to be tried by a petit jury from which members of his race have not been excluded).

[10] It is well to remember that the Sixth and Fourteenth Amendments serve different constitutional purposes by different means. The Sixth Amendment focuses upon the composition of the venire

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Court's holding in *Duren v. Missouri*, 439 U.S. at 364, a *prima facie* violation of the fair cross-section requirement should be found when:

(1) the prosecutor, through his use of peremptory challenges, has excluded members of a distinct racial group;

(2) the representation of the group in the remaining portion of the venire from which the jury is selected is not reasonable in relation to the number of group members in the community at large; and

(3) the underrepresentation is due primarily to the prosecutor's use of peremptory challenges.[11]

[10] *continued*
and its relationship to the petit jury. Thus, under the Sixth Amendment, any defendant may challenge the underrepresentation or exclusion (whether intentional or not) of any racial group. *Duren*, 439 U.S. at 359 n.1, 368 n.26. On the other hand, the Fourteenth Amendment protects against discrimination and is concerned with the composition of the venire and its relationship to the petit jury only insofar as they provide evidence relevant to the ultimate question of discrimination. Thus, under the Fourteenth Amendment, a defendant may challenge only the intentional exclusion of members of his own racial group. *Batson*, 476 U.S. at 96. In some cases, therefore, the State's racial manipulation of the jury venire may violate the Fourteenth Amendment, but not the Sixth Amendment. In other cases, the State's actions may violate only the Sixth Amendment. Thus, the constitutional protections afforded by the Sixth and Fourteenth Amendments, respectively, are not redundant, and both must be given effect.

[11] When a Sixth Amendment challenge is directed to the facial validity of a statute, *Duren* also requires a showing of "systematic" exclusion. 439 U.S. at 364. The case at bar, of course, does not involve any facial challenge to the peremptory challenge statute, and, thus, the "systematic" prong of *Duren* has no bearing here. It is enough, as the Court observed in *Batson*, that "peremptory challenges constitute a jury selection practice that permits 'those to discriminate who are of a mind to discriminate.'" 476 U.S. at 96 (citation omitted). At all events, to require something more in terms of "systematic" discrimination effectively would make the Sixth Amendment a dead letter, as *Swain* did with respect to the Equal Protection Clause. *See Batson*, 476 U.S. at 92-93.

Once a *prima facie* fair cross-section violation has been established, the prosecutor must show that a "significant state interest" was advanced by the deployment of his peremptory challenges. *Id.* at 367. The prosecutor cannot prevail, of course, merely by invoking race or group affiliation because "[a] person's race simply 'is unrelated to his fitness as a juror.'" *Batson*, 476 U.S. at 87, 97 (citation omitted). Instead, the prosecutor must support his actions by reference to some legitimate, racially neutral, non-pretextual justification. *See McCray v. Abrams*, 750 F.2d at 1132.

The deployment of peremptory challenges in a manner that subverts the fair cross-section guarantee must be subject to these reasonable limitations because the peremptory challenge, as this Court unequivocally held in *Batson*, 476 U.S. at 89, cannot take precedence over fundamental constitutional rights.

II.

RELIEF SHOULD BE GRANTED IN THIS CASE UNDER *BATSON* BECAUSE PETITIONER HAS ESTABLISHED A *PRIMA FACIE* FOURTEENTH AMENDMENT VIOLATION.

A. Given The Fundamental Nature Of The Right To The Equal Protection Of The Laws, This Court Should Give Full Retroactive Effect To *Batson*.

Almost two decades ago, Justice Harlan, in two thoughtful dissenting opinions in *Desist v. United States*, 394 U.S. 244, 256-69 (1969), and *Mackey v. United States*, 401 U.S. 667, 675-702 (1971), articulated a set of principles to govern the retroactive effect of new decisions of this Court.[12] In

[12] We recognize, of course, that Justice Harlan's analysis has not yet been fully adopted by this Court. *See Yates v. Aiken*, 108 S.

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the intervening 20 years, this Court has extensively reconsidered the law of retroactivity, and has adopted many of those principles. *See, e.g., Yates v. Aiken*, 108 S. Ct. 534, 537 (1988); *Griffith*, 107 S. Ct. at 713; *United States v. Johnson*, 457 U.S. 537, 549 (1982).

In the process of resurveying the metes and bounds of retroactivity law, this Court has not yet adopted Justice Harlan's view that newly announced constitutional rules should be applied retroactively whenever they affect fundamental rights, without regard to whether they represent a "clear break" with the past. *See Yates*, 108 S. Ct. at 537; *Griffith*, 107 S. Ct. at 716 (Powell, J., concurring). This case presents that opportunity.

In *Mackey v. United States*, Justice Harlan suggested that new constitutional rules should be made fully retroactive "for claims of nonobservance of those procedures that . . . are 'implicit in the concept of ordered liberty.' " 401 U.S. at 693 (Harlan, J., dissenting; quoting *Palko v.*

[12] *continued*

Ct. 534, 537 (1988); *Griffith*, 107 S. Ct. at 716 (Powell, J., concurring). Nonetheless, in addressing the retroactive application of *Batson*, we believe that the logical force of Justice Harlan's opinions in *Desist* and *Mackey*, and the extent to which the Court already has adopted the principles articulated there, warrant consideration of these principles at the outset.

We also recognize that in *Allen v. Hardy*, 106 S. Ct. 2878, 2880 & n.1 (1986) (per curiam), this Court summarily held, without full briefing or oral argument, that *Batson* would not be applied retroactively to those cases on collateral review which became final before *Batson* was announced, and that the Court reached that conclusion because *Batson* was a "clear break" with past precedent. More recently, however, the Court in *Griffith* discarded the "clear break" doctrine in determining the retroactive effect that *Batson* should be accorded in cases that were pending on direct appeal when *Batson* was decided. *Griffith*, 107 S. Ct. at 714. As the Fifth Circuit recently noted, this Court's decision in *Griffith* casts considerable doubt on the continued vitality of the rationale in *Allen*. *Procter v. Butler*, 831 F.2d 1251, 1254-55 n.4 (5th Cir. 1987).

Connecticut, 302 U.S. 319, 324-25 (1937) (Cardozo, J.)). Under Justice Harlan's view, retroactive application should occur whenever the new rule implicates a " 'principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.' " 302 U.S. at 325 (quoting *Snyder v. Massachusetts*, 291 U.S. 97, 105 (1934)).

The racial discrimination involved in *Batson* indisputably implicated fundamental principles of justice, because "[d]iscrimination on the basis of race, odious in all aspects, is especially pernicious in the administration of justice," *Rose v. Mitchell*, 443 U.S. 545, 555 (1979), and is "at war with our basic concepts of a democratic society and a representative government." *Smith v. Texas*, 311 U.S. 128, 130 (1940). *See also Vasquez v. Hillery*, 474 U.S. 254, 262 (1986); *Taylor*, 419 U.S. at 527. The remedy prescribed in *Batson* is therefore informed by the most basic principles upon which our criminal justice system is founded. For that reason, *Batson* is precisely the type of case to which Justice Harlan's view would grant full retroactive effect.

Given the fundamental nature of the rights which *Batson* protects, it would be improper to deny redress to those who, solely due to the fortuities of the judicial process, completed their direct appeals before *Batson* was decided. The chronological details of petitioner's appeals bear no relation to whether he suffered the kind of discrimination which this Court condemned over 100 years ago in *Strauder*, condemned most recently in *Batson*, and, indeed, condemned in every intervening equal protection case, including *Swain*.[13] Moreover, there is no question here that

[13] The central meaning of the Equal Protection Clause is, of course, "that those who are similarly situated be similarly treated." Tussman & tenBroek, *The Equal Protection of the Laws*,

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petitioner was denied his fundamental right to the equal protection of the laws.[14] Because racial discrimination is at war with our concept of ordered liberty, and nowhere more so than in the context of our criminal justice system, which is empowered to take our very lives and liberties, the rule in *Batson* must be given retroactive effect.

[13] *continued*
37 Calif. L. Rev. 341, 344 (1949). If, through the fortuities of the judicial process, a case reached this Court on direct appeal before the Court was prepared to announce the governing constitutional principle, that fact cannot provide any principled basis for distinguishing the case, or for denying to those who came first the relief which the Court has now deemed necessary to redress a fundamental constitutional violation. In fashioning a rule of retroactivity applicable to such cases, it is well to remember that "percolation" may be an indispensable part of our judicial process, but, as Justice Schaefer has aptly observed, the Court also must take care not to "ignore[ ] the impact of the law on real people." Schaefer, *Reducing Circuit Conflicts*, 69 A.B.A. J. 452, 454 (1983).

Indeed, many of the cases that reached this Court prior to *Batson*, when the Court (for its own institutional reasons) was not yet ready to expound the Constitution, may well involve factual circumstances far more susceptible to manipulation of racial prejudice than was the case in *Batson* itself. Similarly, many of them undoubtedly involve more serious penalties, such as capital punishment, where the Eighth Amendment's heightened demand for impartial fact-finding, untainted by racial prejudice or unfairness of any kind, is manifest. *See, e.g., Lowenfield v. Phelps*, 108 S. Ct. 546, 551 (1988); *Turner v. Murray*, 476 U.S. 28, 35-36 (1986); *California v. Ramos*, 463 U.S. 992, 998-99 (1983); *Woodson v. North Carolina*, 428 U.S. 280, 305 (1976). One cannot reasonably assert that the vindication of a criminal defendant's right to have a jury selected without racial discrimination should be nullified by his arrival on the steps of this Court before the doors were opened.

[14] The prosecutor in this case used all of his peremptory challenges to exclude blacks, and could muster only patently pretextual explanations. *See* page 26, note 22, *infra*.

B. Because The Principles Established In *Batson* Protect And Enhance The Reliability Of Criminal Trials, They Should Be Applied Retroactively.

To preserve the integrity and reliability of the criminal justice system, this Court has given retroactive application to new rules designed to enhance the reliability of the trial. *See Ivan V. v. City of New York*, 407 U.S. 203, 204 (1972) (per curiam); *Roberts v. Russell*, 392 U.S. 293, 294-95 (1968) (per curiam). In *Witherspoon v. Illinois*, 391 U.S. 510 (1968), for example, the Court held that the exclusion for cause of certain veniremen, merely because they voiced general reservations about the death penalty, violated the Due Process Clause. *Id.* at 522-23. In according full retroactive effect to this holding, this Court observed (*id.* at 523 n.22; citations omitted):

> [W]e think it clear . . . that the jury-selection standards employed here necessarily undermined "the very integrity of the . . . process" that decided the petitioner's fate, . . . and we have concluded that neither the reliance of law enforcement officials . . . nor the impact of a retroactive holding on the administration of justice . . . warrants a decision against the fully retroactive application of the holding we announce today.

Just as the integrity and reliability of the criminal justice process was undermined by the "stack[ing of] the deck" in *Witherspoon* (*id.* at 523), the prosecutorial use of peremptory challenges to skew the racial composition of the petit jury in *Batson* similarly jeopardized its truth-seeking function. *See Allen v. Hardy*, 106 S. Ct. 2878, 2880-81 (1986) (per curiam). Indeed, if the exclusion of blacks from petit juries were not thought to affect the jury's truth-seeking function, then prosecutors would not have abused the peremptory challenge privilege, and the

Batson decision would not have been necessary.[15] But the *Batson* decision *was* necessary, in large part to protect and enhance the reliability of the criminal trial. In this sense, *Batson* is indistinguishable from *Witherspoon* and other decisions that this Court has deemed to warrant retroactive application.[16]

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[15] Prosecutors discriminate against black veniremen for only one reason, which goes to the very heart of the judicial process: they believe that eliminating blacks from the jury panel will affect the outcome of the case and make a conviction easier to obtain, a belief which is well-founded on social science studies. *See, e.g.*, H. Kalven & H. Zeisel, *The American Jury* 196-98, 210-13 (1966); J. Rhine, *The Jury: A Reflection of the Prejudices of the Community*, in *Justice on Trial* 40, 41 (D. Douglas & P. Noble, eds. 1971); R. Simon, *The Jury and the Defense of Insanity* 111 (1967); J. Van Dyke, *Jury Selection Procedures: Our Uncertain Commitment to Representative Panels* 33-35, 154-60 (1977); Adler, *Socioeconomic Factors Influencing Jury Verdicts*, 3 N.Y.U. Rev. L. & Soc. Change 1, 1-10 (1973); Bell, *Racism in American Courts: Cause for Black Disruption or Despair?*, 61 Calif. L. Rev. 165, 165-203 (1973); Bernard, *Interaction Between the Race of the Defendant and That of Jurors in Determining Verdicts*, 5 L. & Psych. Rev. 103, 107-08 (1979); Broeder, *The Negro in Court*, 1965 Duke L.J. 19, 19-22, 29-30; Davis & Lyles, *Black Jurors*, 30 Guild Prac. 111 (1973); Gerard & Terry, *Discrimination Against Negroes in the Administration of Criminal Law in Missouri*, 1970 Wash. U.L.Q. 415, 415-37; Ginger, *What Can Be Done to Minimize Racism in Jury Trials?*, 20 J. Pub. L. 427, 427-30 (1971); Gleason & Harris, *Race, Socio-Economic Status, and Perceived Similarity as Determinants of Judgments by Simulated Jurors*, 3 Soc. Behav. & Personality 175, 175-80 (1975); McGlynn, Megas & Benson, *Sex and Race as Factors Affecting the Attribution of Insanity in a Murder Trial*, 93 J. Psych. 93 (1976); Ugwuegbu, *Racial and Evidential Factors in Juror Attribution of Legal Responsibility*, 15 J. Experimental Soc. Psych. 133, 143-44 (1979); Comment, *A Case Study of the Peremptory Challenge: A Subtle Strike at Equal Protection and Due Process*, 18 St. Louis U.L.J. 662, 673-83 (1974).

[16] To the extent that prosecutors should now claim detrimental reliance, that claim sounds hollow. This Court has never condoned discrimination in jury selection, and the only change effected by *Batson* was a change in the scheme of proof to be used in establishing discrimination. Moreover, prosecutors cannot claim prejudice

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C. Reliance On *Swain v. Alabama* After This Court's Denial Of Certiorari In *McCray v. New York* Was Erroneous.

Soon after this Court announced its decision in *Swain v. Alabama*, it became clear that the Court's attempt to set the balance—between the constitutional freedom from discrimination and the peremptory challenge privilege—was a failed experiment. As Justice White noted in *Batson*, prosecutorial discrimination was widespread after *Swain*. 476 U.S. at 101 (White, J., concurring). Moreover, as Justice Powell noted, the evidentiary burden that *Swain* had imposed upon criminal defendants was both "crippling," 476 U.S. at 92, and doctrinally inconsistent with less onerous evidentiary burdens developed in subsequent equal protection cases. *Id.* at 93. *See also Castaneda v. Partida*, 430 U.S. 482, 494-95 (1977); *Village of Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266 (1977); *Washington v. Davis*, 426 U.S. 229, 241-42 (1976); *Alexander v. Louisiana*, 405 U.S. 625, 630-32 (1972).

Indeed, the continuing vitality of *Swain* was seriously questioned in the unprecedented opinions announced in connection with this Court's denial of certiorari in *McCray v. New York*. In their dissent from that denial of certiorari, Justices Marshall and Brennan expressed the view that the *Swain* evidentiary burden was inappropriate, 461 U.S. at 968-69, and they urged plenary review "to reexamine the standard set forth in *Swain*." *Id.* at 966. Justice Stevens, joined by Justices Blackmun and Powell, voted to deny the petition, but added (*id.* at 961-63):

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[16] *continued*
from having failed to preserve relevant information, when any such failure was based, in turn, on some tactical advantage which, under *Swain* and its progeny, prosecutors perceived to exist. This Court has never held such "[u]njustified 'reliance' [to be] . . . a bar to retroactivity." *Solem v. Stumes*, 465 U.S. 638, 646 (1984).

> My vote to deny certiorari . . . does not reflect disagreement with Justice Marshall's appraisal of the importance of the underlying issue. . . . I believe that further consideration of the substantive and procedural ramifications of the problem by other courts will enable us to deal with the issue more wisely at a later date. . . . In my judgment it is a sound exercise of discretion for the Court to allow the various States to serve as laboratories in which the issue receives further study before it is addressed by this Court.[17]

Taken together, these two opinions clearly demonstrate that a majority of the Court agreed in *McCray* that the lower courts should undertake further analysis with respect to the problem of racial discrimination in jury selection, and that *Swain* should not be followed blindly. Numerous state and federal courts recognized that *Swain* had been questioned,[18] but few of them accepted the in-

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[17] In his opinion, Justice Stevens clearly invited the lower courts to reexamine the issues involved in *Swain* and its progeny, to undertake an independent analysis, and to avoid a slavish or uncritical reliance on *Swain*. That this invitation was extended to both the state courts and the lower federal courts is evidenced by Justice Stevens' observation that the absence of "conflict of decision within the federal system" counseled in favor of postponing plenary review. *See* 461 U.S. at 962. At least two federal courts so interpreted this observation. *See Simpson v. Commonwealth*, 622 F. Supp. 304, 308 (D. Mass. 1984), *rev'd*, 795 F.2d 216 (1st Cir.), *cert. denied*, 107 S. Ct. 676 (1986); *McCray v. Abrams*, 576 F. Supp. 1244, 1246 (E.D.N.Y. 1983), *aff'd in part and vacated in part*, 750 F.2d 1113 (2d Cir. 1984). Finally, Justice Stevens noted in *Batson*, 476 U.S. at 110-11 n.4, that "[t]he eventual federal habeas corpus disposition of *McCray* [*v. Abrams*], of course, proved to be one of the landmark cases that made the issues in this case ripe for review."

[18] *See Vukasovich, Inc. v. Commissioner*, 790 F.2d 1409, 1416 (9th Cir. 1986); *Bowden v. Kemp*, 793 F.2d 273, 275 n.4 (11th Cir.), *cert. denied*, 106 S. Ct. 3289 (1986); *United States v. Hawkins*, 781 F.2d 1483, 1486 (11th Cir. 1986); *Jordan v. Lippman*, 763 F.2d 1265,

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vitation to reexamine the issues involved, and virtually all continued to follow *Swain* without any critical analysis. Joining these ranks was the Seventh Circuit, which, within a year of the denial of certiorari in *McCray*, declared that *Swain* remained "controlling." *United States ex rel. Palmer v. DeRobertis*, 738 F.2d 168, 172 (7th Cir.), *cert. denied*, 469 U.S. 924 (1984). *See also United States v. Clark*, 737 F.2d 679, 682 (7th Cir. 1984).

In light of *McCray*, the mechanical reliance on *Swain* by the courts below was error. By relying on questioned authority when fundamental constitutional rights are at stake, courts distort the doctrine of *stare decisis*, and, more important, abdicate their essential obligation to uphold the Constitution (*Barnette v. West Virginia St. Bd. of Educ.*, 47 F. Supp. 251, 253 (S.D. W. Va. 1942) (3-judge court), *aff'd*, 319 U.S. 624 (1943)):

> [judges] would be recreant to our duty as judges, if through a blind following of a decision which the Supreme Court itself has . . . impaired as an authority, we should deny protection to rights which we regard as among the most sacred of those protected by constitutional guaranties.[19]

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[18] *continued*

1283 (11th Cir. 1985); *Booker*, 775 F.2d at 766-67; *Prejean v. Blackburn*, 743 F.2d 1091, 1104 n.11 (5th Cir. 1984); *McCray v. Abrams*, 750 F.2d at 1116. *See also State v. Neil*, 457 So. 2d at 483-84; *State v. Gilmore*, 103 N.J. at 518, 511 A.2d at 1154-55.

[19] In constitutional cases, where erroneous decisions cannot be cured by legislation, this Court has long recognized the duty of the judiciary to " 'bow[ ] to the lessons of experience and the force of better reasoning. . . .' " *Edelman v. Jordan*, 415 U.S. 651, 671 n.14 (1974) (Rehnquist, J.; quoting *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 407-08 (1932) (Brandeis, J., dissenting)). *See also Norris v. United States*, 687 F.2d 899, 904 (7th Cir. 1982) (Posner, J.) ("to continue to follow [doubtful precedent] blindly until it is formally overruled is to apply the dead, not the living, law"); *Browder v. Gayle*, 142 F. Supp. 707, 717 (M.D. Ala.) (3-judge court)

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To correct the lower courts' misguided application of *stare decisis* in this case, this Court should hold that continued reliance on *Swain* after the denial of certiorari in *McCray* warrants reversal.[20]

III.

WHEN THE PROSECUTOR OFFERED JUSTIFICATIONS FOR HIS USE OF PEREMPTORY CHALLENGES, THE TRIAL COURT SHOULD HAVE CONSIDERED WHETHER THE JUSTIFICATIONS WERE PRETEXTUAL.

Even if this Court determines that *Batson* should not be given retroactive effect, and that the courts below properly continued to rely on *Swain* after the denial of certiorari in *McCray*, petitioner still is entitled to a hearing on his equal protection claim.[21] This is so because the

[19] *continued*
(Rives, J.) ("[w]e cannot in good conscience perform our duty as judges by blindly following the precedent of *Plessy v. Ferguson* . . . when our study leaves us [believing] . . . that the separate but equal doctrine can no longer be safely followed as a correct statement of the law"), *aff'd*, 352 U.S. 903 (1956) (per curiam).

[20] This Court's ruling in *Allen v. Hardy* has no bearing on the foregoing argument, which focuses, not on the retroactive effect that should be accorded to *Batson*, but on the precedential effect to which *Swain* was entitled after this Court denied review in *McCray*. Moreover, *Allen* is inapposite because that conviction became final before the denial of certiorari in *McCray*, and the present contention was therefore unavailable in *Allen*.

[21] The court below erred in concluding that the claim is procedurally barred (J.A. 17 n.6). At every level of the state and federal proceedings, the State responded to petitioner's claims by contending that petitioner was raising an equal protection claim controlled by *Swain* (J.A. 41 (Cudahy, J., dissenting)). Moreover, because the Illinois Appellate Court and the federal district court both rejected petitioner's claim on the ground that he had failed to demonstrate systematic exclusion under *Swain* (J.A. 41 n.2 (Cudahy, J., dissenting); J.A. 5-6), those courts specifically considered and rejected the equal protection issue on the merits. Thus, even if petitioner had not actually raised the issue at each

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prosecutor in this case chose to waive the benefit of the *Swain* presumption, and, instead, put the matter at issue by volunteering "explanations" for his peremptory challenges.

Presumptions generally are rooted in considerations such as fairness, public policy, probability, and judicial economy. *Basic Inc. v. Levinson*, 108 S. Ct. 978, 990 (1988). Specifically, the *Swain* presumption was principally grounded in the public policy concern that a prosecutor should have wide discretion in exercising his peremptory challenges in a particular case, without being forced to explain his motives. *See Swain*, 380 U.S. at 222. However, while the *Swain* presumption may have served an important purpose, presumptions cannot be applied mechanically, without regard either to their purposes or to the particular circumstances of the case. Courts "must not give undue dignity to [this] procedural tool and fail to recognize the realities of the particular situation at hand." *Panduit Corp. v. All States Plastic Mfg. Co.*, 744 F.2d 1564, 1581 (Fed. Cir. 1984) (per curiam).

The "reality" here is that there was no principled reason for the courts below to have given effect to the *Swain* presumption in the particular circumstances of this case. By making a tactical decision to "explain" the reasons for his peremptory challenges (and thus, perhaps, neutralize a trial judge who had doubtless noticed that all 10 of the prosecutor's challenges had been deployed against blacks), the prosecutor himself defeated the central pur-

[21] *continued*
level in the state courts, the issue would now properly be before this Court. *See Ulster County Court v. Allen*, 442 U.S. 140, 152-54 (1979); *United States ex rel. Ross v. Franzen*, 688 F.2d 1181, 1183 (7th Cir. 1982) (en banc). *See also* J.A. 41-42 & nn.1-2 (Cudahy, J., dissenting).

pose of this presumption. At that point, the presumption should have disappeared.

Moreover, the prosecutor's explanations themselves established racial discrimination.[22] Certainly, the *Swain* presumption of propriety was not intended to preclude judicial action in the face of admitted discrimination, as Justice White, the author of *Swain*, confirmed in *Batson*. 476 U.S. at 101 n.* (White, J., concurring). *See also Tenneco Chemicals v. William T. Burnett & Co.*, 691 F.2d 658, 663 (4th Cir. 1983) (citations omitted) ("a party may not rely on a presumption when evidence from its own case is inconsistent with the facts presumed"). Similarly, the *Swain* presumption should not be read to preclude judicial scrutiny in the present case. The pretextual justifications offered by the prosecutor demonstrate racial discrimination with force equal to that of an outright admission, and therefore require judicial scrutiny.

Because there is no credible reason for giving effect to the *Swain* presumption once the prosecutor has volunteered his pretextual "reasons" for exercising his peremptory challenges, that presumption should not preclude judicial inquiry into the validity of those reasons. The Ninth Circuit made this point in *Weathersby v. Morris*, 708 F.2d 1493, 1496 (9th Cir. 1983) (citation omitted), *cert. denied*, 464 U.S. 1046 (1984):

[22] Judges Cudahy and Cummings were not the only judges to remain unmoved by the prosecutor's pretextual explanations (J.A. 48 & n.6 (Cudahy, J., dissenting)). The Illinois Appellate Court also was unimpressed by the State's justifications (*People v. Teague*, 108 Ill. App. 3d 891, 895, 908, 439 N.E.2d 1066, 1069-70, 1078 (1st Dist. 1982), *cert. denied*, 464 U.S. 867 (1983)), and, indeed, *none* of the judges who have heard this case has ever suggested that the prosecutor's explanations *are* credible.

> Cases where the prosecutor at trial volunteers his or her reasons for using peremptory challenges . . . present a situation distinguishable from *Swain*. . . . Our reading of *Swain*, convinces us that in such circumstances a court need not blind itself to the obvious and the court may review the prosecutor's motives to determine whether "the purposes of the peremptory challenge are being perverted."

In *Garrett v. Morris*, 815 F.2d 509, 511 (8th Cir.), *cert. denied*, 108 S. Ct. 233 (1987), the Eighth Circuit also concluded that the presumption must fall away in such circumstances because "the court has a duty to satisfy itself that the prosecutor's challenges were based on constitutionally permissible trial-related considerations, and that the proffered reasons are genuine ones, and not merely a pretext for discrimination."

In these limited circumstances, inquiry into the prosecutor's volunteered explanations must be permitted if courts are to avoid being made unwilling "accomplices in the willful disobedience of a Constitution they are sworn to uphold." *Elkins v. United States*, 364 U.S. 206, 223 (1960). The lower courts' mechanical invocation of the *Swain* presumption therefore warrants reversal here.

CONCLUSION

The judgment of the United States Court of Appeals for the Seventh Circuit should be reversed and the cause remanded.

Respectfully submitted,

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No. 87-5259

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1987

FRANK DEAN TEAGUE,

Petitioner,

vs.

MICHAEL LANE, Director,
Department of Corrections, et al.,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

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Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Seventh Circuit

BRIEF AMICUS CURIAE OF THE CRIMINAL JUSTICE LEGAL FOUNDATION IN SUPPORT OF RESPONDENT

INTEREST OF AMICUS CURIAE

The Criminal Justice Legal Foundation (CJLF) is a non-profit California corporation organized to participate in litigation relating to the criminal justice system as it affects the public interest. CJLF seeks to bring the due process protection of the accused into balance with the rights of the victim and of society to rapid efficient and reliable determination of guilt and swift execution of punishment.

The present case involves an attack on habeas corpus of a conviction that was constitutional according to settled precedent at the time of the conviction. Such needless attacks on constitutionally rendered verdicts are contrary to the rights of the victims and society which the CJLF was formed to advance. In addition, the attempt to shift the focus of *Batson*-type claims to the Sixth Amendment may impair the ability of minority victims of crime to oppose racially motivated challenges by defense counsel.

SUMMARY OF FACTS AND CASE

Petitioner Frank Dean Teague, a black man, was convicted of armed robbery and attempted murder. (J.A. 15.) He was sentenced to two concurrent terms of thirty years imprisonment. *People v. Teague*, 108 Ill.App. 891, 893, 439 N.E.2d 1066, 1068 (1st Dist. 1982) *cert. denied* 464 U.S. 867 (1983).

The prosecution used its 10 peremptory challenges to excuse 10 black veniremen (J.A. 3). Defense counsel also used one of its peremptory challenges to remove from the venire a black woman who was the wife of a police officer and who had been accepted by the prosecution. (J.A. 3-4.)

The state court rejected petitioner's jury discrimination contention on direct appeal. *People v. Teague*, 108 Ill.App.3d at 891, 439 N.E.2d at 1066. A United States District Court for the Northern District of Illinois rejected petitioner's Sixth Amendment claim on habeas corpus (J.A. 5-6).

On appeal a divided panel of the Seventh Circuit accepted petitioner's Sixth Amendment contention but was

subsequently overruled by the full court sitting en banc. (J.A. 36.)

SUMMARY OF ARGUMENT

Allen v. Hardy, 478 U.S. 255 (1986) decided that *Batson v. Kentucky*, 476 U.S. 79 (1986) would not apply to cases which were final before the date of the *Batson* decision. This result was reached under the traditional *Linkletter-Stovall* approach, but the same result would follow from the Harlan-Powell approach. *Swain v. Alabama*, 380 U.S. 202 (1965) was a precedent binding on lower courts until the day *Batson* was decided. Any judgment rendered and affirmed before *Batson* in reliance on *Swain* was not in violation of the Constitution and laws of the United States, and the writ of habeas corpus does not lie to obtain relief from such a judgment.

Extension of the Sixth Amendment fair cross-section requirement to the petit jury is unnecessary, inadequate and impractical. It is unnecessary because the standing problem of *Batson* can be dealt with under *Peters v. Kiff*, 407 U.S. 493 (1972). It is inadequate because the Sixth Amendment will not protect the victim.

New rules which would not be retroactive on habeas corpus can no longer be made initially on habeas, now that the Court has accepted uniformity of application as a controlling principle in *Griffith v. Kentucky*, ___ U.S. ___, 93 L.Ed.2d 649, 107 S.Ct. 708 (1987).

ARGUMENT

A. *Allen v. Hardy* correctly determined the retroactivity date of *Batson* on habeas under either view of retroactivity.

1. The Two Views of Retroactivity.

In *Allen v. Hardy*, 478 U.S. 255 (1986), this Court decided that *Batson v. Kentucky*, 476 U.S. 79 (1986) would not apply to any case which had become final before the day *Batson* was decided. Petitioner, supported by amicus curiae Lawyers' Committee for Civil Rights Under Law, seeks to have *Allen* overruled to the extent it precludes application of *Batson* to cases which became final after this Court's denial of certiorari in *McCray v. New York*, 461 U.S. 961 (1983). Pet. Brief at 21-32; LCCRUL Brief at 15-24.

Petitioner and LCCRUL maintain that the result they seek will follow from the adoption by this Court in its entirety of the view of retroactivity proposed by Justice Harlan in *Desist v. United States*, 394 U.S. 244, 258 (1969) (dissenting opinion),[1] championed in recent years by Justice Powell, *Hankerson v. North Carolina*, 432 U.S. 233, 246-48 (1979) (concurring opinion), and adopted by the Court for direct review cases only in *Griffith v. Kentucky*, ___ U.S. ___, 93 L.Ed.2d 649, 107 S.Ct. 708 (1987).

For the reasons we have already presented to the Court in *Dugger v. Adams*, 87-121, we agree with petitioner and LCCRUL that the Harlan-Powell view should now be

1 All citations to *Desist* and to *Mackey v. United States*, 401 U.S. 667 (1971) are to the separate opinions of Justice Harlan.

adopted in its entirety. The cogent arguments advanced by Justice White, *Shea v. Louisiana*, 470 U.S. 51, 62-64 (1985) (dissenting opinion), have lost most of their force as a result of *Griffith*. See *Griffith*, 93 L.Ed.2d at 662-63, 107 S.Ct. at 717 (Rehnquist, C. J., dissenting). It is sometimes better to give up the struggle than to see the baby divided in half. See 1 *Kings* 3:26.

Petitioner's second contention, that the Harlan-Powell view mandates retroactivity of *Batson* in this case, stands on far less solid ground. Petitioner has misread Justice Harlan and grasped at straws in a futile attempt to share in the windfall received by Batson, Griffith, and the other direct appellants.

2. The Harlan-Powell Approach.

In Justice Harlan's view, the multi-factor analysis of the *Linkletter-Stovall* approach would be replaced by only two considerations: the scope of the writ of habeas corpus and a "choice of law" inquiry. The first question is the simpler of the two. A habeas petitioner is not entitled to a de novo review of his trial under standards existing at the time of the habeas hearing. He is entitled to the writ only if he is in custody in violation of the Constitution or laws of the United States. 28 U.S.C. § 2254 (a). To determine whether a constitutional violation occurred at trial "the habeas court need only apply the constitutional standards that prevailed at the time the original proceedings took place." *Desist*, 394 U.S. at 263.

The Harlan approach transforms the problem from one of retroactivity to one of choice of law. Just as a procedure may be legal in one jurisdiction and illegal in another, so it may be legal at one time and illegal at another. In most

cases, the doctrine of stare decisis answers the choice of law question. If a decision of this Court rendered before the state proceeding required the state court to decide differently than it did, a violation cognizable on habeas has occurred. Conversely, "the lower courts cannot be faulted when, following the doctrine of *stare decisis*, they apply the rules which have been authoritatively announced by this Court." 394 U.S. at 264.

There are times, however, when stare decisis does not furnish a clear answer to the question of precisely when the law actually changed. The change may be gradual rather than sharp. Between the time when a practice is clearly constitutional and the time when it is clearly unconstitutional, there may be a gray zone. Justice Harlan ventured some preliminary thoughts on this variation, and petitioner heavily relies on this discourse. Pet. Brief at 24-25. On closer examination, this reliance seems misplaced.

Justice Harlan illustrated the potential problem with the series of cases involving electronically aided eavesdropping. In *Olmstead v. United States*, 277 U.S. 438 (1928), this Court took a narrow view of what constitutes a "search." Government agents had tapped phone lines outside the defendants' homes and offices and listened to incriminating conversations. The evidence obtained was admitted over a Fourth Amendment objection.

> "The Amendment itself shows that the search is to be of material things – the person, the house, his papers or his effects. The description of the warrant necessary to make the proceeding lawful, is that it must specify the place to be searched and the person or *things* to be seized.

* * *

> "The Amendment does not forbid what was done here. There was no searching. There was no seizure. The evidence was secured by the use of the sense of hearing and that only. There was no entry of the houses or offices of the defendants." *Id.* at 464 (italics in original).

The *Olmstead* decision rested on two alternate grounds. First, listening to conversations was deemed to be neither a "search" nor a "seizure," and, second there had been no "actual physical invasion." *Id.* at 466. In *Goldman v. United States*, 316 U.S. 129 (1942), the agents had entered an adjoining office and listened through the wall with a microphone/amplifier apparatus. The Court simply reaffirmed *Olmstead* with little discussion. *Id.* at 135-36.

Silverman v. United States, 365 U.S. 505 (1961) is the case which petitioner claims is analogous to *McCray v. New York* in the present situation. Pet. Brief at 25. *Silverman* is much more than that. In *Silverman*, government agents entered an adjoining "row house" with the consent of the owner and inserted a "spike mike" into the party wall until the probe touched a heating duct serving the suspects' house. The agents could then listen to the conversations inside the house as the sound reverberated in the heating ducts. 365 U.S. at 506-507.

The holding of *Olmstead* that eavesdropping is not a "search" was not even mentioned by the majority. The *Silverman* court distinguished *Olmstead's* "physical intrusion" holding by finding a physical intrusion in the case. The intrusion, however, was committed through the "usurpation" of the heating duct, not through a trespass as defined in the

law of property and torts. The government's argument that the local law of party-wall property rights should govern was squarely rejected. 365 U.S. at 511-12.

Even though *Silverman* did not state in words that *Goldman* or *Olmstead* was overruled, it is a decision of the Court which is clearly at odds with the principles underlying the prior decisions. When the old rule was officially pronounced dead in *Katz v. United States*, 389 U.S. 347 (1967), the *Katz* court itself declared that the old rule had been so eroded by intervening cases that it was no longer controlling. *Id.* at 353. In other words, *Katz* was merely recognizing a development which occurred some time earlier.

3. Application to the Present Case.

In order to answer Justice Harlan's "choice of law" question, one must first determine where the boundary lies. In the case of electronic eavesdropping without common law trespass, the boundary might have been *Silverman* or it might have been *Katz*. *Desist* was a direct review case, so Justice Harlan did not need to answer his hypothetical question. He merely pointed out, adopting the law student's favorite phrase, that it "could be persuasively argued" that *Silverman* was the boundary. 394 U.S. at 265. Petitioner's argument that the law must be in a state of "repose" for nonretroactivity to apply, Pet. Brief at 23, misses the entire point. If the law was different at one time than it is now, the line must be drawn somewhere. The line is not drawn where the law is in "repose" but rather at some point between the time when a lower court is obligated to follow the old rule, *Desist*, 394 U.S. at 264, and the time when it becomes obligated to follow the new one, *id.* at 265. Where the law evolves gradually through a series of

decisions, as in the electronic surveillance cases, this point may be difficult to determine with precision. Where one decision makes a "clear break," however, the determination is easy. The present case is easy.

When did the change in the law brought about by *Batson* occur? When did lower courts cease to be obligated to follow *Swain v. Alabama*, 380 U.S. 202 (1965), and when did they become obligated to inquire into the motives of peremptory challenges in a single case which appear on their face to be racially motivated? These are the questions that are properly asked if the Court adopts the Harlan approach.

Petitioner points to this Court's denial of certiorari in *McCray v. New York*, 461 U.S. 961 (1983), and claims that event to be the proper boundary for the choice of law inquiry. But what is the holding of *McCray*? The action taken by the Court, in its entirety, is "Petitions for writs of certiorari denied." How does this form a watershed in the law of peremptory challenges? Petitioner and supporting amicus count noses in the separate concurring and dissenting opinions, conclude a majority was leaning their way, and proclaim that lower courts were no longer required to follow *Swain*. Pet. Brief at 8; LCCRUL Brief at 21-23. Nose-counting is fine in parliamentary maneuvering, but this is a court of law.

Petitioner and LCCRUL fail to grasp the difference between the Court as an institution and the collection of individuals who happen to occupy the high bench at a particular moment in our nation's history. Law does not change when mortality, retirement, and the fortunes of politics happen to place on the Court five people who are inclined to vote a particular way. Law changes when the

Court as an institution *in the process of deciding a case or controversy* renders an opinion on a question of law which is both within the Court's jurisdiction and necessary to the resolution of the matter. The Court itself cannot make law in any other manner; the individuals who comprise it most certainly cannot.

Could one survey the commencement speeches delivered by the various Justices at various law schools last June, tally up a majority for a particular proposition, and declare that lower courts were no longer bound by a contrary precedent? Obviously not. Yet petitioner's argument is not much different. In our government of laws and not of people, nothing said in these separate opinions can have the slightest diluting effect on a precedent established by this Court. The precedential value of a case may be weakened or even destroyed without use of the magic word "overruled," but only the Court as an institution may do so. A lower court cannot, *Thurston Motor Lines v. Rand*, 460 U.S. 533, 535 (1983), and individual Justices cannot.

The state of peremptory challenge laws before *Batson* was vastly different than the state of electronic surveillance law before *Katz*. *Swain v. Alabama*, 380 U.S. 202 (1965) was a solid precedent established by a majority of this Court. No cases had been decided by the Court inconsistently with its principles or questioning its authority. *Swain*

was therefore binding authority on the state and lower federal courts on the federal questions resolved.[2] *Thurston*, 460 U.S. at 535. This is precisely the situation in which the state courts cannot be faulted for carrying out their duty to follow this Court's precedents. *Desist*, 394 U.S. at 264 (Harlan, J., concurring). A precedent established by this Court is *per se* the dominant federal constitutional standard unless and until a subsequent decision *of the Court* either overrules it explicitly or reaches a result contrary to its reasoning.

Any rule to the contrary would undermine the doctrine of stare decisis.

> "That doctrine permits society to presume that bedrock principles are founded in the law rather than in the proclivities of individuals, and thereby contributes to the integrity of our constitutional system of government, both in appearance and in fact.
>
> "While *stare decisis* is not an inexorable command, the careful observer will discern that any detours from the straight path of *stare decisis* in our past have occurred for articulable reasons, and only when the Court has felt obliged 'to bring its opinions into agreement with experience and

2 *Swain* was, of course, no barrier to the establishment of independent state restrictions on peremptory challenges. See *People v. Wheeler*, 22 Cal.3d 258, 283-87, 582 P.2d 748, 766-68 (1978). Justice Stevens recognized that on independent *state* grounds the *states* could serve as laboratories, *McCray*, 461 U.S. at 963. His opinion does not imply that state courts can disregard this Court's precedents on *federal* questions.

with facts newly ascertained.' *Burnet v. Coronado Oil & Gas Co.*, 285 U.S. 393, 412 (1932) (Brandeis, J., dissenting)." *Vasquez v. Hillery*, 474 U.S. 254, 265-66 (1986).

Petitioner's contention that a detour from the straight path can be discerned by counting up votes in opinions concurring in and dissenting from a denial of certiorari is contrary to the entire tradition of Anglo-American jurisprudence. The contention is wholly without merit and should be emphatically rejected.

4. The "Fundamental Fairness" Exception.

Once the boundary is determined, the Harlan-Powell approach adopts a nearly *per se* rule of nonretroactivity on habeas for cases on the "old law" side of the line. There are only two exceptions. One exception occurs when this Court decides as a matter of substantive law that the conduct in question cannot constitutionally be punished as criminal. The other occurs when the procedure in question is "fundamentally unfair." Both exceptions are exceedingly rare. See *Solem v. Stumes*, 465 U.S. 638, 653, n. 4 (1984) (Powell, J., concurring in the judgment).

Amicus LCCRUL attempts to invoke the fundamental fairness exception, LCCRUL Brief at 15-18, but falls far short of the mark. This exception applies only to nonobservance of those procedures "essential to the substance of a fair hearing." *Mackey v. United States*, 401 U.S. 667 , 693 (1971) (Harlan, J., concurring and dissenting). These are the requirements so basic that they would have applied to the states under *Palko v. Connecticut*, 302 U.S. 319 (1937), overruled *Benton v. Maryland*, 395 U.S. 784, 796 (1969),

even before the "incorporation" of the specific guarantees of the Bill of Rights. *Mackey*, 401 U.S. at 693.

Expressed another way, the "fundamental fairness" exception applies to violations which render the trial a sham. To extract a confession by torture and base a conviction on it is such a violation. See *Brown v. Mississippi*, 297 U.S. 278 (1936). A trial is fundamentally unfair when the trier of fact has a direct, personal financial interest in seeing the accused convicted. *Tumey v. Ohio*, 273 U.S. 510 (1927). So, too, in an adversary system of Byzantine procedural complexity, is it fundamentally unfair to pit a layman against an experienced trial attorney. *Gideon v. Wainwright*, 372 U.S. 335 (1963). These are all cases where reasonable people could not disagree that the defendant has been "railroaded."

Petitioner's complaint in the present case stands in sharp contrast to the fundamental fairness cases. The Illinois system provided each side with an equal number of challenges to be exercised without any restrictions at all. These challenges could be exercised not only on the basis of race but also on the basis of occupation, political beliefs and attitudes, or even an intangible discomfort with a venire member's attitude. It is highly significant that the defense, not the prosecution, removed the last black member from the venire. While petitioner now claims that an all-white jury was unfair, at the time of his trial he was more interested in getting rid of the policeman's wife. J.A. at 2-3.

The rule of *Batson* is only partially for the benefit of the defendant. A substantial component of the *Batson* rationale is the need to purge our judicial system of racism, preserve public confidence in the system, and preserve the minority jurors' right to participate in the process. *Batson*

v. Kentucky, 476 U.S. 79, 87 (1986); *id.* at 104-105 (Marshall, J., concurring). In this respect, a defendant with a *Batson* claim is in the same position as one with an exclusionary rule claim. He is the judiciary's instrument to enforce a collateral policy. The exclusionary rule has nothing whatever to do with the fairness of the trial and is generally not cognizable at all on habeas. *Stone v. Powell*, 428 U.S. 465 (1976). We would not suggest going so far with *Batson*, but the collateral policy aspect of *Batson*'s rationale weighs heavily against the "fundamental fairness" argument.

This Court has spent much of the last quarter century developing a detailed set of rules of criminal procedure from the Bill of Rights. With over a hundred volumes of United States Reports added to the shelves since this revolution began, it is highly unlikely that any rules created from this point onward will qualify for the fundamental fairness exception. In any event, LCCRUL's argument misses the mark by a country mile.

B. Extension of the Sixth Amendment fair cross-section requirement to the petit jury is unnecessary, inadequate, and impractical.

1. Necessity and Standing.

Petitioner contends that the Fourteenth Amendment basis of *Batson* precludes use of the *Batson* rule by defendants who are not members of the excluded race. Pet. Brief at 8. It is not necessarily so.

Batson held that its rule did apply where the defendant and the excluded venire member were of the same race, 476 U.S. at 96. *Batson* did not explicitly reject the possibility of extending standing to others, however. It was not

necessary in that case to decide whether a defendant could prevent peremptory challenges made against prospective jurors of a race other than his own, because both defendant and the challenged jurors were black. *Batson*, 476 U.S. at 82-83. The question of whether membership in the excluded group is required was simply not presented by the case.

In *Peters* v. *Kiff*, 407 U.S. 493 (1972) this Court allowed a white petitioner to attack the exclusion of blacks from the jury system. In *Peters*, petitioner was unable to invoke the Sixth Amendment to attack the jury discrimination because *De Stefano v. Woods*, 392 U.S. 631 (1968) had held that *Duncan v. Louisiana*, 391 U.S. 145 (1968) would not apply retroactively. *Peters*, 407 U.S. at 496 (lead opinion). In the lead opinion Justices Marshall, Douglas, and Stewart emphasized due process, finding jury discrimination to be a violation of defendant's due process rights, which have no racial requirement for standing. *Id.* at 504. This opinion also took note of the federal statutory prohibition of jury discrimination. *Id.* at 498, 505.

Another approach was taken by Justice White, concurring in the judgment, joined by Justices Brennan and Powell. The concurrence focused on this country's long standing policy against jury discrimination as demonstrated

by *Hill v. Texas*, 316 U.S. 400 (1942), an equal protection case. Like the lead opinion, Justice White also looked to a statutory manifestation of this policy, 18 U.S.C. § 243, to give Peters standing to make his claim. *Peters*, 407 U.S. at 507 (White, J. concurring). Section 243 was part of the Civil Rights Act of March 1, 1875 and makes it a crime to exclude citizens otherwise eligible for jury service for reasons of "race, color, or previous condition of servitude."[3] The concurrence decided that section 243 "reflects the central concern of the Fourteenth Amendment with racial discrimination by permitting petitioner to challenge his conviction on the grounds that Negroes were arbitrarily excluded from the grand jury that indicted him."[4] *Peters*, 407 U.S. at 507 (White, J., concurring).

Regrettably, the *Peters* case did not produce a majority opinion. Nonetheless, the result of the case on its facts establishes a precedent that a defendant does not necessarily have to be of the same race as the excluded potential jurors to have a standing in a case where the Sixth Amendment does not apply.

3 "No citizen possessing all other qualifications which are or may be prescribed by law shall be disqualified for service as grand or petit juror in any court of the United States, or of any State on account of race, color, or previous condition of servitude; and whoever, being an officer or other person charged with any duty in the selection or summoning of jurors, excludes or fails to summon any citizen for such cause shall be fined no more than $5,000." 18 U.S.C. § 243.

4 While this opinion only addresses discrimination in grand jury selection, the statute also would apply to the petit jury due to the inclusive language of the statute "grand or petit juror." 18 U.S.C. § 243.

McCleskey v. Kemp, ___ U.S. ___, 95 L.Ed.2d 262, 107 S.Ct. 1756 (1987) is another example of the relaxation of standing under the Equal Protection Clause. McCleskey, a black man convicted of killing a white police officer, challenged his sentence on equal protection grounds in two ways. First, he claimed that people who murder whites are more likely to be sentenced to death than those who murder blacks, and second, black defendants are more likely to receive the death penalty than white defendants. *McCleskey*, 95 L.Ed.2d at 277-78, 107 S.Ct. at 1766. While defendant's standing to raise his second claim was unquestionable, his standing to raise the first was more problematic. Arguably, McCleskey was attempting to defend the rights of black murder victims, but this Court has historically been reluctant to grand third party standing to constitutional litigants. See *Warth v. Seldin*, 422 U.S. 490, 499 (1975). The Court overcame this problem, however, by holding that McCleskey was not asserting the rights of black murder victims, but instead was attacking an "irrational exercise of governmental power" which was not necessary to accomplish a permissible government objective. *McCleskey*, 95 L.Ed.2d at 278, n. 8, 107 S.Ct. at 1766.

McCleskey demonstrates that equal protection standing is not a closed book. *McCleskey* shows the broad nature of the rights protected under the Equal Protection Clause and the interest of society in making sure that the State does not violate equal protection principles. The *McCleskey* court, like the *Peters* court, was willing to expand its conception of standing to determine whether the state has committed the grave error of protecting white victims more than black victims.

In a proper case, this Court can and should consider whether *Peters* and *McCleskey* extend *Batson* standing

beyond members of the excluded class. This is not the case. Petitioner does belong to the excluded class, and the standing question is irrelevant.

2. *Adequacy and Victims' Rights.*

Abuse of peremptory challenges is a two-way street. Racially motivated peremptory challenges made by the prosecution dominates the attention of the courts and commentators. See, e.g., *Batson v. Kentucky*, 476 U.S. 79, 89, n. 12 (1986), *Swain v. Alabama*, 380 U.S. 202 (1965); Note, *Rethinking Limitations on the Peremptory Challenge*, 85 Colum.L.Rev. 1357 (1985). Given the proper circumstances, however, the defense can also be motivated to make racially motivated peremptory challenges. Brown, McGuire, & Winters, *The Peremptory Challenge as a Manipulative Device in Trials: Traditional Use or Abuse*, 14 New Eng.L.Rev. 192, 224 (1978). The problem with using the Sixth Amendment as the instrument to ban racial peremptory challenges is that it only protects the defendant in criminal matters. By its very wording it cannot restrict the actions of the defense: "In all prosecutions *the accused* shall enjoy the right to . . . an impartial jury." U.S. Const. amend. VI (italics added).

This problem was recognized by Justice Marshall in his concurrence in *Batson*. "The potential for racial prejudice, further inheres in the defendant's challenge as well." *Batson*, 476 U.S. at 108 (Marshall, J., concurring). If defendant is accused of committing a racially motivated crime, counsel could consider it important to peremptorally challenge every venire member who is of the same race as the victim. One example is the racially charged "Howard Beach" case. In this case, four white teen-agers were charged with the killing of a black man in the Queens, New York neighbor-

hood of Howard Beach. The trial court, in response to the prosecutor's contention that the defense had used peremptory challenges to exclude three prospective jurors because they were black, found that the defense had made peremptory challenges on the sole ground of group bias. In response to the prosecution's challenges, the trial court promised to limit defendant's future use of peremptory challenges, citing *Batson*. 18 Criminal Justice Newsletter Oct. 1, 1987 at 6-7.

A chilling example of the defense use of peremptory challenges is the case of Arthur McDuffie. McDuffie was a thirty-three-year-old black insurance salesman with no prior criminal record who died from head injuries received from the police while being arrested for running a red light. P. Di Perna, *Juries on Trial: Face of American Justice* 179 (1984). The defense used its peremptory challenges to guarantee an all white jury. After hearing six weeks of testimony, the jury took only two and a half hours to return a n guilty verdict. *Ibid.* In the ensuing riot:

> "Blacks ran through the streets chanting 'McDuffie! McDuffie!' and 'Where is justice for the black man in America?' Cars were overturned at the state building. More whites were beaten. The verdict had hit the tense community like gasoline on a flame because it was perceived as an all-white cover-up. In the end the riots left sixteen dead, several hundred injured, and approximately $100 million in damages." *Id.* at 179- 80.

The McDuffie case illustrates that society has a compelling interest in assuring that all parts of the community can be represented on juries. This means that neither the

defense nor the prosecution should be permitted use peremptory challenges to racially bias the jury.

> "Selection which is or even appears to be discriminatory obviously destroys confidence and support among those against whom the discrimination seems aimed. And, seeing justice manipulated in their favor, the dominant group itself may suffer a breakdown in morality and an increase in lawlessness. This is illustrated in the extreme by the impunity with which racial and civil rights crimes have been committed in the South." Kuhn, *Jury Discrimination: The Next Phase* 41 S.Cal.L.Rev. 235, 246 (1968) (footnote omitted).

Using peremptory challenges makes a jury less representative and more homogenous as each side eliminates those who are thought to be hostile to its interests. J. Van Dyke, *Jury Selection Procedures* 168 (1977). Thus both the prosecution *and* the defense must be prevented from having their assumptions regarding group bias reflected in the final composition of the petit jury if the goals of *Batson* are to be achieved.

The problem of discriminatory peremptory challenges by the defense was recognized in the leading pre-*Batson* peremptory challenge case, *People v. Wheeler*, 22 Cal.3d 258, 583 P.2d 748 (1978). In *Wheeler*, the California Supreme Court recognized that defense peremptory challenges pose a threat similar to those of the prosecution, and therefore indicated in dicta that the defense would be held to the same standard as the prosecution in making peremptory challenges. 22 Cal.3d at 282, n. 29, 583 P.2d at 765. See also *People v. Snow*, 44 Cal.3d 216, 228-29, 746

P.2d 452, 459 (1987) (Eagleson, J. concurring). However, *Wheeler* was based solely on California's state constitutional right to trial by jury, Cal. Const. art. I § 16. *Wheeler*, 22 Cal.3d at 283-87, 583 P.2d at 766-68. Unlike the Sixth Amendment, that provision extends the right of jury trial to the prosecution as well as the defense. See *People v. Terry*, 2 Cal.3d 362, 377, 466 P.2d 961, 968 (1970).

In a proper case, the Court should re-examine the question reserved in *Batson* of "whether the Constitution imposes any limit on the exercise of peremptory challenges by defense counsel." 476 U.S. at 89, n. 12. This case, again, is not the case. To keep that door open, the Court should continue to recognize the Fourteenth Amendment and the statutes enacted under it as the primary protection against this kind of discrimination. The Sixth Amendment, with its one-sided operation, is not equal to the task.[5]

3. Impracticality

In addition to the other problems with extending the Sixth Amendment to covering peremptory challenges, there is also a serious problem with the practicality of making such an extension. The court recognized this problem in *Taylor v. Louisiana*, 419 U.S. 522 (1975), where it refused to extend the Sixth Amendment cross-section guarantees to the actual composition of the petit jury. *Taylor*, 419 U.S. at 538; see *Lockhart v. McCree*, 476 U.S.

5 The Fourteenth Amendment, of course, is limited to actions of states against people. Victims are people; defense lawyers are officers of the court and hence of the state. Furthermore, the court's enforcement of a racist defense challenge is state action. Cf. *Shelley v. Kraemer*, 334 U.S. 1 (1948).

162, 173-74 (1986). We understand that this topic will be covered at length in respondent's brief.

C. Any rule which would not be retroactive on habeas corpus cannot be initially made on habeas corpus.

The Fourteenth Amendment rule established in *Batson v. Kentucky*, 476 U.S. 79 (1986) is not applicable to the present habeas corpus petition under either the *Linkletter-Stovall* approach, *Allen v. Hardy*, 478 U.S. 255 (1986), or the Harlan-Powell approach, see part A.3, pp. 8-12, above. Petitioner seeks to avoid the nonretroactivity bar by establishing a new rule, substantially the same as the *Batson* rule as far as this case is concerned, under the Sixth Amendment. This attempt raises the issue of the effect of the uniformity principle on the making of new rules on habeas corpus. See, *Griffith v. Kentucky*, ___ U.S. ___, 93 L.Ed.2d 649, 664-65, 107 S.Ct. 708, 718-19 (1987) (White, J. dissenting). We submit that the uniformity principle embraced by *Griffith* precludes the making of new rules on habeas corpus, except in those rare cases where the rules made would be retroactive.

In reaching the conclusion that new rules established on direct review must apply to all other cases on direct review, this Court recognized as controlling two fundamental principles of the adjudication process. First, this Court only adjudicates "cases" and "controversies." *Griffith*, 93 L.Ed.2d at 658, 107 S.Ct. at 713. A conviction can be reversed only because the applicable law requires that it be reversed. The integrity of judicial review requires the same result in all cases where the same law is applicable. *Ibid.* Second, if a different rule is to apply to another case, fairness requires that there be some principled difference in the facts or posture of the case to justify the difference. Similarly situated

defendants must be treated the same. *Desist v. United States*, 394 U.S. 244, 258-59 (1969) (Harlan, J., dissenting). While some may disagree with this approach, see *Shea v. Louisiana*, 470 U.S. 51, 62-63 (White, J., dissenting), it has been embraced by the Court and is now firmly established precedent.

Nothing in the distinction between direct review and habeas corpus justifies abandoning these principles merely because a case is on collateral review. When a habeas petitioner proposes a new rule, that rule must apply to all similarly situated petitioners or to none. When legislatures seek to classify people, the Constitution requires them to have a rational basis for doing so. See L. Tribe, *American Constitutional Law* § 16.2 (2d ed. 1988). The judicial branch can hardly declare itself exempt from this basic requirement.

The rule which petitioner proposes would not be retroactive on habeas under either view of retroactivity, just as *Batson* is not. The extension of the Sixth Amendment fair cross-section requirement to the petit jury requires a flat overruling of *Lockhart v. McCree*, 476 U.S. 162, 173-74 (1986) and would be a "clear break" under the traditional view, "virtually compell[ing] a finding of nonretroactivity." *United States v. Johnson*, 457 U.S. 537, 549-50 (1982).

For the same reasons as *Batson*, the proposed rule qualifies for none of the Harlan view's narrow exceptions to its nearly *per se* rule of nonretroactivity on habeas. See part A.4, pp. 12-14, above. Regardless of whether petitioner's proposed rule is adopted, his petition would be "judged according to the constitutional standards existing at the time of conviction," *Griffith*, 93 L.Ed.2d at 662, 107 S.Ct. at 717 (Powell, J., concurring). Any discussion of a

new standard, therefore, would be pure dictum. If the Court were to announce a standard which does not apply to the case before it, it would be legislating, not adjudicating. *Desist*, 394 U.S. at 259.

Whether the rule in effect at the time of the state proceedings was a correct rule is a moot question in every federal habeas proceeding. The writ does not lie, in the Harlan view, to redress a "violation" of a rule not existing at the time.

The dilemma pointed out by Justice White in *Griffith*, 93 L.Ed.2d at 664-65, 107 S.Ct. at 718-19, vanishes when the Harlan view is fully accepted and properly applied. The tail will not wag the dog by forcing application to all habeas petitions of new rules made on habeas. Cf. *Ibid.* New rules simply cannot be made on habeas unless they independently qualify for retroactivity.

Conclusion

The judgment of the Seventh Circuit should be affirmed.

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Respectfully submitted,

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